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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-6779

LARRY WILLIAMS,

Appellant

V.

THE STATE OF INDIANA,

Appellee

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the provision in the Indiana Death Penalty Statute which provides "the State may seek the death penalty" employs a procedure that allows for the arbitrary and capricious selection of victims contrary to Furman v. Georgia (1972), 408 U.S. 238, and subsequent United States Supreme Court decisions.

2. Whether the statutory procedure of imposing death has a chilling effect on Fifth and Sixth Amendment rights by giving to individual prosecuting attorneys the power to exploit the threat of death in plea negotiation, contrary to United States v. Jackson (1968), 390 U.S. 570, and subsequent United States Supreme Court decisions.

3. Whether the Indiana Death Penalty Statute provides adequate appellate review procedures to ensure a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitution

(1) Fifth Amendment . . . [N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .

(2) Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

(3) Eighth Amendment - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(4) Fourteenth Amendment . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutes

(1) Indiana Code 35-50-2-3 (Penalties for Murder; See Appendix N)

(2) Indiana Code 35-50-2-9 (Indiana Death Penalty Statute; See Appendix O)

(3) Supreme Court Rule 2

RULES FOR THE APPELLATE REVIEW OF SENTENCES

Supreme Court Rule 2:

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.

OPINIONS BELOW

The trial court's opinion denying the Appellant's Motion to Dismiss the Death Penalty, filed before arraignment, is set out in the Appendix at pages B-1 through B-4. The trial court did not issue any other opinions.

The Indiana Supreme Court upheld the constitutionality of the Indiana death penalty and affirmed the death sentence imposed against the Appellant in an opinion reported in the regional reporter at 430 N.E.2d 759. The opinion has not yet been published in the Indiana Official Reporter. A copy of the Indiana Supreme Court's opinion is attached in the Appendix at pages I-1 through I-20.

JURISDICTION

The LaPorte Circuit Court on August 25, 1980, sentenced the Appellant to death for the crime of murder. The execution was stayed pending review by the Indiana Supreme Court. On January 19, 1982, the Indiana Supreme Court completed its review and in a three to two decision upheld the constitutionality of the Indiana death penalty statute against claims that it violated the defendant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution.

The Indiana Supreme Court denied the Appellant's Petition for Re-hearing on March 26, 1982. Notice of Appeal to the United States Supreme Court was filed in the LaPorte Circuit Court on April 12, 1982. Notice of Appeal was also filed with the Indiana Supreme Court.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2). The basis of this appeal is a direct challenge to the constitutionality of the Indiana death penalty statute.

STATEMENT OF THE CASE

On August 25, 1980, Judge Robert Gettinger of the LaPorte Circuit Court sentenced the Appellant, Larry Williams, to die in the electric chair. The execution was stayed pending appeal to the Indiana Supreme Court. On January 19, 1982, the Indiana Supreme Court completed its review and in a three to two decision, affirmed the imposition of the death penalty and upheld the constitutionality of the death penalty statute. A request for re-hearing was denied on March 26, 1982.

The State's case against Larry Williams was commenced by grand jury indictment in the Marshall Superior Court by charging Larry Williams, George Redman and Larry Perkins with the following: murder, felony murder, armed robbery, and conspiracy to commit armed robbery. In a separate charging instrument, as required by statute, the State requested the death penalty against Larry Williams and listed as an aggravating circumstance the fact that the murder occurred during a robbery. The defendant, by counsel, filed a lengthy motion to dismiss based, among other things, on the unconstitutionality of the Indiana death penalty statute; more particularly , on the violation of the defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights as interpreted by United States Supreme Court cases since 1968. A change of venue was taken, and Judge Gettinger denied the motion to dismiss in an opinion attached as Appendix B. Prior to trial, the State amended the death penalty request and listed as an additional aggravating circumstance the fact that the appellant Williams had been convicted of another murder.

At trial, co-defendants, George Redman and Larry Perkins, both of whom entered into plea bargains concerning two additional murders, testified against Williams and received terms of thirty-four (34) and fifty-four (54) years respectively. The jury found Williams guilty on all counts. At a separate hearing the jury recommended the death penalty. Judge Gettinger followed the jury's recommendation and sentenced the Appellant to death.

Counsel for Appellant Williams filed a motion to correct errors with the trial court, once again raising the federal constitutional rights of the Appellant. This motion was denied without opinion. On appeal, the defendant once again alleged that the Indiana death penalty statute violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

The Indiana Supreme Court rejected the arguments of Appellant Williams and in a three to two decision upheld the imposition of the death penalty. See Appendix I. The Appellant Williams renews his challenge to the constitutionality of the Indiana death penalty statute and again contends that it violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

REASONS FOR PLENARY CONSIDERATION

The issues in this case deal with the most basic of all rights, the right to life, and whether or not the State of Indiana has established a death penalty procedure that enables it to apply the sanction of death in a regularized and even-handed manner. It is Appellant's contention the State has not achieved the even-handed application of the death penalty as required by the federal constitution. The reasons why the questions are so substantial that plenary consideration is necessary are set out in A through C below and correspond to the issues presented.

A THE SENTENCING SCHEME OF THE INDIANA DEATH PENALTY CONTINUES TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION PROHIBITING CRUEL AND UNUSUAL PUNISHMENT IN THAT THE SELECTION OF THOSE AGAINST WHOM A DEATH SENTENCE IS IMPOSED IS ARBITRARY AND CAPRICIOUS

It is important to note the manner in which the Indiana death penalty statute is invoked. The range of penalties for murder are found under Indiana Code §35-50-2-3:

> (a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years,

> with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more then Ten Thousand Dollars ($10,000.00).
>
> (b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9[35-50-2-9] of this chapter.

Thus, for the death penalty to be an available sentencing option for the crime of murder in Indiana, the prosecuting attorney must follow the procedures set forth in Indiana Code §35-50-2-9. The threshold requirements of that statute provide:

> (a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed . . . . (See also Appendix O).

Because the Indiana statutory scheme is couched in discretionary language, the prosecutor need not seek a death sentence even when "at least one of the aggravating circumstances" does in fact exist. Arising from this short statutory phrase "the State may seek a death sentence" are a multitude of constitutional infirmities.

The Indiana death penalty statute is unconstitutional because the discretion granted prosecuting attorneys to seek or to not seek the death penalty results in an arbitrary and capricious selection of victims contrary to the Eighth and Fourteenth Amendments to the United States Constitution. The evil inherent in the statute arises from the use of the word <u>may</u> in the phrase "the State may seek a death sentence . . . ." By the use of the word "may", individual prosecuting attorneys throughout the State are thus delegated the power to decide whether or not to seek the death penalty. The prosecuting attorney is given unchecked discretion to decide in each individual case who shall live and who shall die. Such unchecked discretion in the hands of one public official has been condemned:

> Rather we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether the defendant committing these crimes should die or be imprisoned. Under these laws no standards govern selection of the penalty. People live or die dependent upon the whim of one man or twelve. <u>Furman v. Georgia</u> (1972), 408 U.S. 238, 253 (Douglas, J.).

Although Furman dealt with in-court discretion the central focus in Furman and subsequent Supreme Court cases has been the elimination of the arbitrary use of power and the development of guidelines to check discretion. In the Indiana statute there is nothing to prevent a prosecuting attorney from requesting the death penalty only for blacks, if that is his prejudice. Further, it takes very little imagination to envision other arbitrary applications inherent to the death penalty statute: a prosecutor in one county may be more or less philosophically opposed to the death penalty; a prosecutor in another county may or may not seek the death penalty because of an election year. Examples are many. The result is that whether a defendant lives or dies may depend upon the county in which he committed the offense. It is still up to the "whim of one man" to decide who lives and who dies. Such arbitrariness in the selection of death penalty candidates is an unconstitutional violation of the Due Process Clause because it amounts to cruel and unusual punishment:

> It would seem to be incontestible that the death penalty inflicted on one defendant is unusual if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. Furman, 208 U.S. at 242 (emphasis added).

The net result is a sentencing scheme that permits the threshold decision of whether a defendant lives or dies to depend upon the whim of the prosecuting attorney. Certainly, this discretion specifically granted to Indiana prosecutors is:

> Statutory language of such a standardless sweep [it] allows . . . prosecutors . . . to pursue their personal predilections. Legislatures may not so abdicate their personal responsibilities for setting standards of the criminal law . . . . Where inherently vague statutory language permits such selective law enforcement there is a denial of due process. Smith v. Goguen (1974), 415 U.S. 566, 575.

In upholding the constitutionality of the Indiana death penalty statute, the Indiana Supreme Court found that the statute was identical to the statutes of Georgia and Florida. Williams v. State, 430 N.E.2d at 763; Appendix I-3. However, in neither

Georgia nor Florida is there statutorially authorized discretion to seek or to not seek the death penalty. The Florida murder statute provides that any premeditated killing or killing during the perpetration of a felony "shall be murder in the first degree and shall constitute a capital felony". Fla. Stat. Ann. §782.4(1)(a) (Supp. 1979), see Appendix P. Thus, it is clear that a Florida prosecutor cannot direct the sentencing options for premeditated murder or felony murder. The possibility of a death sentence applies across the board and evenhandedly to all defendants charged with murder. Similarly, the Georgia Statute, Ga. Code Ann. §26-1101(c), states that a "person convicted of murder shall be punished by death or by imprisonment for life". However, in Indiana the prosecutor is authorized to pick and choose which defendants will face death. Clearly, the Indiana statute does not fulfill the basic requirements outlined in Furman, "by replacing arbitrary and wanton . . . discretion with objective standards to guide, regularize and make rationally reviewable the process for imposing the sentence of death." Woodson v. North Carolina, (1976) 428 U.S. 280 at 302-303.

The Appellant recognizes that under Gregg v. Georgia, (1976) 428 U.S. 153, 49 L.Ed.2d 859, this Court upheld the Georgia death penalty statute under an attack that prosecuting attorneys had the discretion to charge murder, or manslaughter, or charge no crime at all. This Court held that traditional prosecutorial discretion to charge an offense did not lead to the arbitrary and capricious application of the death penalty, for to hold otherwise would be "an indictment against our entire system of justice." Gregg, 428 U.S. at 226. That is not what is argued here. The Appellant does not assert as unconstitutional traditional or general prosecutorial discretion; rather, the Appellant challenges the specific grant of discretion to prosecutors to arbitrarily distinguish between noncapital murder and capital murder. What is violative of the Eighth Amendment prohibition against arbitrary selection is the power to charge two individuals with the very same offense, Ind. Code §35-42-1-1, and select one as a death penalty candidate, and grant to the other no possibility of death.

The existing system in Indiana provides that from the

greater pool of individuals charged with murder under Indiana Code §35-42-1-1, a subset is selected against whom the death penalty will be sought and subsequently imposed. The selection of this subset is totally up to the whim of the prosecutor and his decision is beyond all judicial review and control.

The result is the creation of two crimes: capital murder and noncapital murder. This is true even though members of both groups are charged with violating the very same statute. This is not the same prosecutorial discretion tolerated under Gregg v. Georgia, supra. Upon what basis the ninety-two county prosecutors in Indiana distinguish between capital murder and noncapital murder is a subject of sheer speculation and conjecture; there simply is no uniformity among the various prosecutors. By definition, the individual prosecutor's distinction between capital murder and noncapital murder is an arbitrary selection and is therefore unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

B CONTRARY TO THE OPINION OF THE INDIANA SUPREME COURT, THE INDIANA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT ALLOWS INDIVIDUAL PROSECUTING ATTORNEYS TO EXPLOIT THE THREAT OF DEATH IN PLEA NEGOTIATIONS AND THEREBY PLACES IMPERMISSIBLE BURDENS UPON A DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, ALL AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT.

As pointed out earlier, the statutory juncture at which the prosecutor is granted unchecked, unguided, and unreviewable discretion of whether or not to seek a death sentence leads to an arbitrary and capricious selection of those against whom the sanction is actually imposed. But this grant of prosecutorial discretion does more, much more: it allows the State to vindictively exploit the threat of death as a bargaining chip in plea negotiations. The statutory scheme therefore allows prosecutors to place impermissible burdens upon a defendant's Fifth Amendment right not to incriminate himself, and his Sixth Amendment right to a jury trial. The result of Indiana's sentencing scheme is that those defendants who assert their fundamental rights are penalized, such as the

Appellant, while those who waive their rights are rewarded. This the State of Indiana may do in plea negotiations for lesser punishments, but not in capital cases.

In United States v. Jackson (1968), 290 U.S. 570, this Court held unconstitutional the death penalty provision of the Federal Kidnapping Act, 18 U.S.C. §1201(a)(1934). Under the Act a defendant could be sentenced to death only if a jury recommended the death penalty. Thus, a peculiar effect of the statute was that the death penalty was not an available sentencing option if a defendant pled guilty or if he waived his right to a jury trial. This Court concluded that the statutory scheme placed impermissible burdens upon a defendant's Fifth and Sixth Amendment rights and consequently penalized those defendants who refused to waive their rights.

The evils condemned in Jackson are present in this case. Indeed, the Jackson defect is even more pervasive in Indiana, for here the prosecutor is given complete control over plea bargaining. Nevertheless, the Indiana Supreme Court concluded that the principles of Jackson did not apply because "the death sentence may be imposed after a guilty plea or a waiver of jury trial as well as after a plea of not guilty followed by a jury trial." Williams v. State, 430 N.E.2d at 763, see Appendix I-5. The conclusion by the Indiana Supreme Court, however, completely overlooks the fact that this Court in Jackson confronted the same argument and rejected it in its entirety:

> Moreover, the argument goes, a defendant cannot avoid the risk of death by attempting to plead guilty or waive jury trial. For even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free, in the Government's view of the statute, to convene a special jury for the limited purpose of deciding whether to recommend the death penalty. Jackson, 390 U.S. 570, 572, 28 L. Ed.2d 138, 142.

Moreover, the Indiana Supreme Court further overlooks the fact that in Indiana all a prosecutor must do in plea negotiations to assure a defendant no possiblity of death is to merely not file a request for the death penalty, or withdraw the request prior to the submission of the plea of guilty. Under Indiana law, the trial court must dismiss the death request if a motion is made by the

prosecutor. Ind. Code §35-3.1-1-13 (1978). Thus, in Jackson the prosecutor was unable to guarantee death would not be imposed, while in Indiana the prosecutor has the power to make an ironclad bargain and absolutely guarantee no possibility of a death sentence. The result is a sentencing system in which the evils condemned in Jackson run unabated.

The primary evil which this Court sought to eliminate in United States v. Jackson, was the promulgation of a sentencing system in which only those defendants who asserted their fundamental constitutional guarantees were sentenced to death, while anyone willing to waive those rights was guaranteed no possibility of death. Or, as this Court stated:

> The defendant who abandons his right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. Jackson, 390 U.S. at 581.

The Jackson Court, of course, went on to hold that such a system of imposing death was indeed unconstitutional. But, in Indiana, those who assert their right to trial by a jury are penalized while those who waive their rights are rewarded. This is in essence the heart of plea bargaining, and based on this premise the Indiana Supreme Court concluded: "We find no constitutional error due to the use of the death penalty statute in the plea bargaining process." Williams v. State, 430 N.E.2d at 764; Appendix at I-6.

In support of its unprecedented decision permitting and encouraging the State of Indiana to exploit the threat of death in the plea bargaining process, the Indiana Supreme Court cited Corbitt v. New Jersey (1978), 439 U.S. 212, 58 L.Ed.2d 466, and Bordenkircher v. Hayes (1978), 434 U.S. 357, 54 L.Ed.2d 604. But neither Corbitt nor Bordenkircher involved the death penalty.

This Court's decision in Corbitt did not go so far as to even insinuate that life and death may be exploited in plea negotiations. Rather, Corbitt will permit the State to "extend a proper degree of

leniency in return for guilty pleas." 439 U.S. at 223, 58 L.Ed.2d at 477. The exploitation of life over death to secure a plea of guilty and a waiver to trial by jury is simply not the "proper degree of leniency" contemplated in Corbitt. In fact, the majority of this Court in Corbitt went so far as to warn in a footnote:

> We do not suggest that every conceivable statutory sentencing structure, plea-bargaining system, or particular plea bargain would be constitutional. 439 U.S. at 226, fn 15, 58 L.Ed.2d at 478, fn 15.

Moreover, to back up this warning the majority went on to suggest that Corbitt should not be construed as permitting the exploitation of death in plea negotiations:

> The principal difference is that the pressures to forgo trial and to plead to the charges in this case are not what they were in Jackson. First, the death penalty which is 'unique in its severity and irrevocability', (citation omitted), is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death. Corbitt, 439 U.S. at 217, 58 L.Ed.2d at 473. (Emphasis added).

Nevertheless, the Indiana Supreme Court cited Corbitt as support for its decision that death may be exploited in plea negotiations.

Bordenkircher v. Hayes, supra, is the second case relied upon by the Indiana Supreme Court to support the proposition that "no constitutional error [exists] due to the use of the death penalty statute in the plea bargaining process." 430 N.E.2d at 764; Appendix at G-6. But Bordenkircher, like Corbitt was not a capital case. Rather, Bordenkircher only permitted under the due process clause of the Fourteenth Amendment the use of the habitual offender statute in the bargaining process. Because Bordenkircher was a close decision, (5-4) the majority of this Court specifically limited its holding by warning:

> There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case . . . did not violate the Due Process Clause of the Fourteenth Amendment. Bordenkircher, 434 U.S. at 365, 54 L.Ed.2d at 612.

Thus, the Indiana Supreme Court's unsupported and unprecedented extension of Bordenkircher to include the exploitation of death in plea negotiations ignores the very limitation imposed upon the decision by the majority of the Justices of this Court, a limitation based upon cases which recognize that death cases are "a class apart."

> It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration. Griffin v. Illinois, 351 U.S. 12, 28, 100 L.Ed. 891, 904.
>
> This court, too, almost always treats death cases as a class apart. Furman, 408 U.S. at 286 (Brennan, J., concuring).
>
> The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Id.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a one hundred year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 961.

Finally, the potential is great for prosecutorial vindictiveness and prosecutorial abuse of life over death in plea negotiations. The majority in Bordenkircher tolerated a certain amount of prosecutorial vindictiveness in plea negotiations which involves the use of the habitual offender statute. The dissent, on the otherhand, rejected this position by stating that the "realistic likelihood of vindictiveness," 434 U.S. at 366, 54 L. Ed2d at 613, was enough to condemn the practice under the Due Process Clause. The majority, nevertheless, did acknowledge the potential for prosecutorial abuse:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation omitted], and for an agent of the State to pursue a course of action whose objective is to penalize a person's re-

liance on his legal rights is 'patently unconstitutional.' Bordenkircher, 434 U.S. at 363, 54 L.Ed.2d at 610.

Moreover, in Corbitt, where the issue in plea negotiations was the number of years to be spent in prison, not whether a defendant was to die, the majority concluded:

> We discern no element of retaliation or vindictiveness against Corbitt for going to trial . . . Nor for exercising a constitutional right. Corbitt, 439 U.S. at 323, 58 L.Ed.2d at 477.

In this case, however, the appellant stands by the record which is replete with examples of the State's vindictiveness toward him for refusing to accept the same plea bargains that were offered to his co-defendants. Indeed, at the sentencing hearing the State simply argued quite cogently that the appellant must die for "his constitutionally protected recalcitrance". Corbitt, 439 U.S. at 232, 58 L.Ed.2d at 482 (dissenting opinion):

> Mr. Jones (Deputy Prosecuting Attorney): The defendant argues that he should not be penalized because [he] chose to go to trial and not plead guilty. We don't feel that it is a matter of penalizing him at all; we think it is a matter of recognizing, and giving him credit for his total lack of remorse, for his total lack of any compassion or concern on his own part with respect to his involvement in these brutal crimes. Death Penalty Hearing, Tr. 1049, ll. 4-11; see also, Tr. 548, p. 5 of State's Answer to Motion to Correct Errors; Tr. 587, ll. 14-27, and Tr. 588, ll. 9-21, Hearing on Defendant's Motion to Dismiss Death Penalty.

The dissent in Corbitt, 439 U.S. at 228, 58 L.Ed.2d at 479, absolutely condemns the position of the State as it is reflected in the above quote from the transcript. Moreover, the Corbitt dissent would not tolerate such a situation in any criminal case, let alone a capital case. Further, the majority in Corbitt, as well as Bordenkircher, strongly suggests that the potential for vindictiveness will be tolerated only when the number of years of imprisonment is involved, not when the issue is life or death: "[I]t is a material fact that under the New Jersey law, the maximum penalty for murder is life imprisonment, not death." Corbitt, 439 U.S. at 217, 58 L.Ed.2d at 473.

In conclusion, in Williams v. State, supra, the Indiana Supreme Court extended Bordenkircher v. Hayes far beyond what this Court intended. The reliance by the Indiana Supreme Court upon Corbitt v. New Jersey for the proposition that death is a legitimate lever in plea negotiations is not even supported by the Corbitt decision itself. Quite the contrary, Corbitt supports appellant's claim that death cannot be exploited in plea negotiations. In essence, the Indiana Supreme Court permits and condones what no other state allows: the exploitation of life over death in plea negotiations, and the penalizing of this appellant for the assertion of his fundamental right to trial by jury and the right to remain silent. Bordenkircher permits such exploitation only when it involves the number of years to be spent in prison; but when life and death is at issue, all potential for the capricious and vindictive application of the death sentence must be eliminated:

> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. Beck v. Alabama (1980), 447 U.S. 625, 637, 65 L.Ed.2d 392, 403 (Stevens, J., joined by Burger, C.J., Brennan, Stewart, Blackmun, Powell, J.J.)

C. THE INDIANA DEATH PENALTY STATUTE DOES NOT PROVIDE FOR MEANINGFUL APPELLATE REVIEW OF DEATH PENALTY CASES AND THEREFORE THE STATUTE CONTINUES TO VIOLATE THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT NECESSARY TO INSURE COMPLIANCE WITH THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The Indiana Death Penalty Statute fails to provide for meaningful appellate review to insure the command of Furman v. Georgia, 408 U.S. 238 (1972), that the arbitrary and capricious application of the death penalty be eliminated. The appellate review defects arise in two different ways. First, the statute fails to outline a procedure to enable courts of review to distinguish the few cases in which the death penalty is imposed from the many in which it is not. Although the statute

lists aggravating and mitigating factors, there is nothing in the statute that requires the jury to articulate the reasons for its decision to impose death. Godfrey v. Georgia (1980) 446 U.S. 420, 64 L.Ed.2d 398, requires the sentencing authority to specify the reasons for its decision in order to facilitate review. The Georgia statute, unlike Indiana's, requires the jury to designate in writing the aggravating circumstances it found to exist. Similarly, the Florida statute requires the trial court to:

> . . . set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist . . ., and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances [enumerated] and upon the records of the trial and sentencing proceedings. Fla.Stat.Ann. §921.141(3); see App. Q.

In the instant case the jury returned a general verdict that stated:

> We, the jury, recommend to the court that the death penalty should be imposed. (Tr.45).

In this case there is no explanation of any finding that weighed the aggravating circumstances against the mitigating circumstances to arrive at a decision. Nevertheless, the trial judge in Indiana is the sentencing authority and the jury's verdict is advisory only. However, reasons given by the Judge for the imposition of the death penalty attest to the statute's lack of specificity and detail to permit meaningful appellate review:

> The Court renders these sentences for the reasons that the imposition of any lesser sentence would depreciate the seriousness of the crime; that the jury has expressed, on behalf of our society, a moral concern about the crimes committed in our society which we consider as atrocious crimes; that for some crimes that are especially heinous,

> our jury again has expressed the belief that 'to fight fire with fire' is an appropriate response for our society to make, Tr. 1951, 11.17-25.

On docketing of the appeal the Indiana Supreme Court ordered the trial judge to make more specific written findings upon which the death penalty was imposed. (This technique was also used in one of the two preceding capital cases in Indiana, Judy v. State (Ind. 1981), 416 N.E.2d 95). The trial court then complied and listed the reasons set out in Appendix H. In neither the original sentence nor in the amended findings ordered by the Supreme Court is there a finding that at least one statutory aggravating circumstance exists. This results because the statute does not channel discretion by clear and objective standards that provide specific and detailed guidance that "make rationally reviewable the process of imposing the sentence of death." Godfrey, 446 U.S. at 428, 64 L.Ed.2d at 406.

The trial court's finding that the potential to depreciate the seriousness of the crime . . . .". Tr 1051, l. 19, is not a listed aggravating circumstance of the statute. The trial court's perception of what the jury believes is an atrocious or heinous crime is not listed, nor is the lex talionis strategy to "fight fire with fire." As the dissenting opinion of Judges DeBruler and Prentice indicates, the "fight fire with fire" rationale, "is central to his decision, as he repeated [it] in his second order following remand by this Court." 430 N.E.2d 771; Appendix I-19. Such nebulous and unauthorized statutory reasons for the imposition of the death penalty have been rejected by this Court:

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding thatthe offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which members of

> the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the statute's] terms. In fact, the jury's interpretation of [the statute] can only be the subject of sheer speculation. Godfrey, 446 U.S. at 428-29, 64 L.Ed.2d at 406-7.

This Court went on to hold that such a finding in the trial court provided "no principled way to distinguish this case, in which the death penalty was imposed from the many cases in which it was not." Godfrey, 446 U.S. at 433, 64 L.Ed. 2d at 409.

Similarly, the imposition of the death penalty because:

1. The court feels that any lesser sentence would depreciate the seriousness of the crime; and

2. The court feels that the jury has expressed, on behalf of our society, a moral concern about crimes committed in our society which we consider to be atrocious crimes; and

3. That this was a crime so heinous that the court feels that the jury expressed the belief that the only appropriate response for our society to make in such a crime is 'to fight fire with fire',

are extraordinarily defective and leave to the Judge the opportunity to intuit motives of the jury which are nowhere expressed. The statute is therefore constitutionally infirm because it does not channel the sentencer's discretion in such a way as to guide and regularize and make rationally reviewable the decision to impose death.

Further, the review defect is even more pronounced in the Indiana Supreme Court. The death penalty statute itself does not establish guidelines for review in order to insure even-handed application. Instead, the legislature provided only that:

> The review which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. Ind. Code § 35-50-2-9(h); see App. O.

The only rule which the Indiana Supreme Court has promulgated for review of sentences is Rule 2, which is a general rule of appellate review applicable to all criminal sentences:

> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find said sentence appropriate to the particular offense and offender for which such sentence was imposed. Supreme Court Rule 2; see also, 430, N.E.2d at 765; App I - 8.

This standard does not comport with the command of Godfrey for clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death:

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. Godfrey, 446 U.S. at 428, 64 L.Ed.2d at 406.

The Indiana Supreme Court's provision that "except where said sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender" provides no more inherent restraint than the Georgia provision condemned. Clearly, the Indiana statute and Supreme Court Rule 2 do not allow for a comparative analysis of cases to distinguish one case from another in order to insure a uniform application of the death sentence.

Moreover, the rule implicitly forbids comparison with factually similar cases and compares each case with a reasonable

person standard:

> . . .unless no reasonable person could find said sentence appropriate to the particular offense and offender for which such sentence was imposed. Rule 2 (2) (Emphasis added)

Surely, the reasonable person standard would allow the infliction of death in any murder case. However, more is required to prevent the aberrant imposition of death from occuring. Contrary to preventing arbitrariness, the Indiana Rule actually authorizes it.

Finally, the discretion vested in the prosecuting attorney to request or not request the death penalty for all persons charged with the same crime results in a system that renders it procedurally impossible for the Indiana Supreme Court to compare factually similar cases that emerge from our ninety-two counties. The Indiana Sumpreme Court never reviews the growing number of cases in which the prosecuting attorney dismisses the death request for a felony murderer who agrees to plead guilty, not to a lesser included offense, but to the very same offense for which the appellant is scheduled to die. Moreover, there are an alarming number of cases in which individuals plead guilty to multiple felony murders, like the co-defendants of appellant, and yet no comparison is made between those cases in which death was not imposed as a result of a plea bargain, and the few cases in which death is imposed for the refusal to accept the State's plea agreement.

The Indiana Supreme Court even admitted that the statutory scheme of the Indiana death penalty "does not impose review on those decisions to grant specific individuals mercy when given at any level." Williams v. State, 430 N.E. 2d at 764; Appendix I-7. But, the Indiana Supreme Court even refused to compare factually identical cases, let alone factually similar cases:

> The fact that defendant's two accomplices were given significantly less severe sentences as a

> result of plea bargains does not effect the reasonableness of defendant's own sentence. Defendant's sentence must be judged by the particular facts of his own case, not the facts accompanying his accomplices' cases. Williams v. State, 430 N.E.2d at 765; Appendix I-8.

This description of the death penalty review procedures employed in Indiana ignores the command by this Court that all capital punishment review procedures must be structured in such a fashion to insure the facts present in one case will reach a result similar to the result reached in a factually similar case. See, e.g. Proffitt v. Florida (1976), 428 U.S. 242, 49 L.Ed.2d 913. As a recent example, this Court vacated a death sentence imposed under the "constitutional" statute of Georgia by noting that the procedures in that particular case did not amount to meaningful appellate review:

> A capital sentencing scheme must, in short, provide a 'meaningful basis for distinghishing the few cases in which [the penalty] is imposed from the many in which it is not.' Godfrey v. Georgia (1980), 446 U.S. 420, 428, 64 L.Ed.2d 398, 406.

For the Indiana Supreme Court to assert that the death sentence will be reviewed only by the facts of that particular case without resort to any other case, let alone resort to the results reached in the cases of co-defendants, is to reject the responsibility placed upon it by this Court's numerous death penalty decisions. Indeed, as the Indiana Supreme Court acknowledged, review of the sentence in this case involves no more of a searching inquiry than that involved in any other case. "Reasonableness" of the sentence under Supreme Court Rule 2 is not sufficient to amount to meaningful appellate review to insure that:

> The reasons present in one case will reach a similar result to that reached under similar circumstances in another case. Proffitt v. Florida, 428 U.S. at 251, 49 L.Ed. 2d at 922.

Moreover, the Indiana court's refusal to compare the cases of

the appellant's co-defendants, and its procedural inability to compare other factually similar cases, is no less constitutionally defective than what occurred in Godfrey. In death penalty cases, the Constitution demands more, much more, than the nebulous standard embodied in Indiana Supreme Court Rule 2.

CONCLUSION

It is true that "[t]here is no perfect procedure for deciding in which cases governmental authority should be used to impose death." Lockett v. Ohio (1978), 438 U.S. 586, 605, 57 L.Ed.2d at 973, 990, (Burger, C. J., concurring). But what is certain is that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." Gardner v. Florida (1977), 430 U.S. 349, 358. Indiana's death penalty scheme fails to comply with this goal in three respects.

First, individual prosecuting attorneys are granted the specific discretion to designate some murders as capital offenses, and other murders as noncapital offenses. In other words, individuals charged with and convicted of the very same offense are subjected to the whim of the prosecutor as to whether he desires to designate the offense as a capital murder or merely a noncapital murder. On what basis one murder is a capital felony while another factually similar murder is a noncapital offense is a subject of sheer speculation and conjecture. The distinctions made by the ninety-two individual prosecuting attorneys in Indiana are by definition arbitrary and wanton, and therefore violative of the Eighth and Fourteenth Amendments to the United States Constitution.

The second constitutional infirmity of the Indiana Death

Penalty is what has been termed the Jackson defect. The practice in Indiana, which by the Williams' decision is now encouraged and condoned by the Indiana Supreme Court, is to exploit life over death in the plea bargaining process. The prosecutor has complete control over the request for the death penalty. He is able to enter into an ironclad bargain that assures a defendant that if he pleads guilty, no possibility of death will exist. On the other hand, those defendants such as the appellant who refuse to waive their fundamental right to trial by jury and the right to remain silent "stand[] forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." Jackson, 390 U.S. at 581. By this appeal, this Court is again faced with the problem "to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." Id. This Court of course held in Jackson that the Constitution did not tolerate such a system. The Indiana Supreme Court, however, decided in this case that in light of Bordenkircher v. Hayes, supra, the exploitation of death in the plea bargaining process is materially no different than the exploitation of the habitual offender statute in plea negotiations. This Court is now called upon to decide if the Indiana Supreme Court's unprecedented extension of Bordenkircher is indeed correct.

The final Constitutional defect of the Indiana death penalty is the lack of meaningful appellate review. First, the death penalty statute fails at the trial court level to lend adequate guidance to the decision-making process of imposing death. Secondly, the standard of review employed by the Indiana Supreme Court as embodied in Supreme Court Rule 2 is indicative of the fact that the state's highest court does not engage in a comparative analysis to insure that the reasons present in one case will lead to the same result as the result reached in a factually similar case. Finally, the discretion granted to prosecutors to dismiss the death penalty through plea bargain-

ing makes it procedurally impossible for the Indiana Supreme Court to compare factually similar cases. Rather, the Supreme Court only reviews those cases in which death was imposed because the defendant refused to plea bargain. The net result is a sentencing system which does not impose death in a guided, even-handed and nonarbitrary fashion.

In conclusion, the death penalty scheme promulgated in Indiana does not comport with even the basic constitutional requirements as enunciated in capital cases decided by this Court. The Indiana Death Penalty does not comply with the tenents of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and should be therefore struck down.

Respectfully submitted:

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STATE OF INDIANA)		IN THE MARSHALL SUPERIOR COURT
) SS:		
COUNTY OF MARSHALL)		1980 CALENDAR TERM
STATE OF INDIANA)		CAUSE NO. SCR 80-9
)		
VS)		
)		
LARRY WILLIAMS,)		
LARRY PERKINS and)		MOTION TO DISMISS
GEORGE REDMAN)		DEATH PENALTY REQUEST

Comes now defendant, Larry Williams, and moves to dismiss the indictment filed against defendant Williams, asking for the death penalty, on the grounds that the statute is unconstitutional in three particulars:

1. Said death penalty statute allows for the arbitrary election of victims contrary to the United States Supreme Court Mandate;

2. Said statute does not provide for meaningful review of the reasons for the infliction of the death penalty upon the defendant, contrary to the United States Supreme Court Mandate.

3. Said death penalty is cruel and unusual punishment, contrary to the Indiana Constitution founded on principals of reformation. Attached to this Motion To Dismiss is a Memorandum of Law in support of each contention.

Jere L. Humphrey, Attorney
Larry Williams, Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion was mailed to Mr. James Easterday, PEAGLER, SOWINSKI & EASTERDAY, 225 West Jefferson Street, Plymouth, Indiana, 46563, and Doug Hite, KIZER, NEU, JOYCE, HITE & WYLAND, 309 East Jefferson Street, Plymouth, Indiana, 46563, this 12 day of February, 1980, by ordinary U.S. Mail with sufficient postage affixed thereto.

Jere L. Humphrey, Attorney

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STATE OF INDIANA	)	MEMORANDUM OF LAW ON THE
	)	
VS	)	UNCONSTITUTIONALITY OF THE
	)	
LARRY WILLIAMS, et al.	)	INDIANA DEATH PENALTY

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held unconstitutional the Georgia and Texas statutes that permitted the infliction of death as a criminal punishment. These statutes were held as violative of the 8th Ammendment's prohitition agaisnt cruel and unusual punishment. The Indiana Supreme Court followed in the wake of Furman and struck down as unconstitutional the death penalty in this State. Adams v. State, 259 Ind, 164, 284 NE 2d 757 (1972). The Furman decision, however, did not reach the ultimate question of whether the infliction of the death penalty was constitutionally impermissible in all circumstances. Consequently, the legislatures of the several states have attempted to design death penalty statutes which correct the constitutional defects outlined by the Furman Court

In Furman, each Justice presented his own reasoning as to the constitutional deficiencies of the death penalty statutes then under review. Douglas, J., 408 U.S. at 240; Brennan, J., at 257; Stewart, J., at 306; White, J., at 310; Marshall, J., at 314. However, taking as a whole the five seperate opinions of the majority, two underlying constitutuinal defects become obvious. First, the majority of the Furman Court objected to the arbituary and wanton application of the death penalty to only a certain class of defendants. See e.g., Douglas, J., 408 U.S. at 245. The second constitutional objection of the Furman majority was that the death penalty statutes provided no guidance to a court or jury in its decision on whether to impose death as a punishment. See, e.g., Stewart, J., at 310. In other words, the Furman

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Court suggested that a death penalty statute must set forth concrete standards which a judge or jury may uniformly apply to a certain category of cases; and which, as a result, enables a reviewing Court to assess the reasoning by which the judge or jury arrived at its decision to impose death.

Thus, the various state legislatures, including Indiana, amended their statutory schemes in an attempt to make the application of the death penalty nonarbitrary and therefore in compliance with Furman. Included in these statutory schemes, were objective standards by which a judge or jury could rationally assess a convicted dedendant's conduct and thereby arrive at a uniform decision on whether to impose death as a punichment for that conduct.

The constitutionality of two state death penalty statutes has been upheld by the United States Supreme Court. Gregg v. Georgia, 428 U.S. 153 (1976); Profitt v. Florida, 428 U.S. 242 (1976). Attached to this memorandum as Exhibit "A" is a reproduction of the Florida death penalty Statute; Exhibit "B" is the Georgia Statute; and Exhibit "C" is the Indiana Statute. In the analytical light of the Furman, Gregg, and Profitt decisions, it is necessary to compare the Georgia and Florida Statutes with the Indiana death penalty Statute. Upon such analysis, one inescapable conclusion is clear: The Indiana legislature failed in its attempt to make the death penalty statute comply with Furman and therefore Indiana's present statute remains unconstitutional.

I

The death sentence in Indiana, I.C. 35-50-2-9 (1977), is applied wantonly, conpriciously, and arbitrarily. It does not provide an opportunity for the Indiana Supreme Court to rationally review the trial court's decision making process of whether

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to impose a sentence of death. Therefore, the Indiana death penalty continues to violate the Indiana and United State Consitituional prohibition against cruel and unusual punishment.

A

Justice Douglas' concurring opinion in Furman dealt almost exclusively with the evils of an abritrarily imposed death sentence.

> It would seem to be incontestable that the death penalty inflicted on one defendant is "Unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

408 U.S. at 242.

Justice Douglas is concerned with the abribrary application of the death penalty to "minorities whose numbers are few, who are out casts of society, and who are unpopular, but whom society is willing to see suffer...." 408 U.S. at 245. However, Justice Douglas is equally concerned with a legal system that allows for the arbitrary infliction of a sentence of death.

> Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of twelve.

408 U.S. at 253. Contrary to the warning of Justice Douglas, the decision of whether the death penalty is to be imposed in Indiana initially depends on the decision of one person; the prosecuting attorney.

Under Indiana's statutory scheme, the death sentence is not mandatory. Indiana's death penalty statute, I.C. 35-50-2-9 (1977), provided that "the state may seek a death sentence for murder..." (emphasis added). The decision is soley that of the prosecutor. Such unchecked discretion in the hands of one public official can

[redacted]

lead only to the arbitrary and wanton application of the death sentence.

It is this discretion within the legal system to which Justice Douglas directs his attack.

> Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Furman, 408, U.S. at 255.

The Indiana statutory scheme is nothing more that a lottery system. Whether the death sentence is to be sought against a defendant depends, not upon the characteristics of his crime, but rather upon the County in which the crime took place; the temperment of the prosecuting attorney; the nearness of the trial to an election year; or the simple sadistic personality of a single individual, the prosecuting attorney. A system of justice that imposes the death sentence on such tenuous grounds is specifically what the United States Supreme Court condemned in Furman v. Georgia.

> When the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Id., 408 U.S. at 293 (Brennan, J.,concurring). Clearly, the Indiana legislature has failed in its attempt to make the infliction of the death sentence nonarbitrary in Indiana.

The State may argue that the discretion of the prosecutor to seek the death penalty is a necessary exercise of informed selectivity. That is, "(D)eath is inflicted ... only in extreme cases." Furman, at 293. In his total rejection of this argument Justice

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Brennan states that:

> (W)hen a country of over 200 million people inflicts an unusually severe punishment no more than fifty times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.
>
> Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in states where death is an authorized punishment for those crimes. However, the rate of infliction is characterized - as "freakishly" or "spectacularly" rare, or simply as rare--it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?
>
> . . .
>
> Informed selectivity, of course, is a value not to be denigrated. Yet presumably the states could make precisley the same claim if there were ten executions per year, or five, or even if there were but one. That there may be as many as fifty does not stregthen this claim. When the rate of infliction is at this low level, it is highly implausible that only the worse criminals or the criminals who commit the worse crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme". Nor is the distinction credible in fact.... Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. . . . . In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

408 U.S. 293 - 95. Clearly, the procedure in Indiana to allow the prosecutor to first decide whether to seek the death sentence is "not constructed to guard against the totally capricious selection of criminals for the punishment of death." Id. at 295.

As stated earlier, the Supreme Court has recently upheld as constitutional the death penalty of two states. Gregg v Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). What is it about Georgia and Florida that makes their death

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penalty statute nonarbitrary in comparison to Indiana? The answer is simple. Both Georgia and Florida authorize either life imprisonment or death as the statutory penalty for murder. Compare Exhibit "A" and Exhibit "B" with Exhibit "C". The prosecuting attorneys of Georgia and Florida do not have to make the arbitrary decision of whether to seek the death penalty; the legislatures of both states have already decided that upon conviction of murder, death may be inflicted instead of life imprisionment. In Florida and Georgia, the decision to seek the death penalty can not be made by the prosecutor; and rightfully so. The procedure in Indiana, however, makes the decision on whether "(p)eople live or die, dependent on the whim of one man...." Furman, 408 U.S. at 253.

It is important to note that in both Gregg and Proffitt the petitioners argued "that the decision made by the prosecutor - either in negotiating a plea to some offense lesser than capital murder or in simply declining to charge capital murder - are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in Furman." Gregg, 428 U.S. 153, 224 (1976). The Supreme Court rejected this argument, but on grounds totally inapplicable to the argument presented here.

The petitioners in Gregg and Proffitt argued that the prosecutor possessed an unconstitutional amount of discretion in whether to charge a defendant with, for example, voluntary manslaughter instead of murder. The present argument against the death penalty procedure in Indiana does not allege the unconstitutionality of this type of prosecutorial discretion. Rather, the concern presently is directed toward the discretion an Indiana prosecutor possess in whether to seek the death penalty in the first place. For example, it is quite probable that a prosecutor in Lake or

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or Marion counties would be confronted with the factual situation similar to the case at bar; that is, a murder committed during the perpatration of a robbery. It is also quite probable that those prosecutors may decide not to seek the death penalty. That decision could be based upon any number of arbitrary and capricious reasons, such as; social position of the defendant; the defendant's race; the ethnic and moral background of the community; or even the prosecutor's personal and moral repugnance of capital punishment.

In other words, it is possible and quite probable that, under Indiana procedure, two different defendants could commit in two different counties almost identical offenses; they could be charged under identical criminal statutes; and yet one could be threatened with only life imprisonment while the other faces death. Again, the decision of life or death being "dependant on the whim of one man. . . ." Furman, 408 U.S. at 253.

The fact that a situation similar to that described above has or has not occured is immaterial. All that is important is that it is possible, under Indiana procedure, for such a situation to occur. Indeed, it is quite probable that it will occur.

> The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.
>
> When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. . . . An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contempory society.

Furman, 408 U.S. at 295.

Indiana's statutory scheme for imposing the death penalty is clearly an arbitrary and capricious system. The death sentence statute in Indiana, I.C. 35-50-2-9 (1977), is therefore void

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on the grounds that it violates the cruel and unusual punishment clause of Article 1 §16 of the Indiana Constitution and the Eighth Amendment of the United States Constitution.

B.

Nothwithstanding the argument proposed in Part A above, the death sentence statute of Indiana appears to be very similar to the statutes of Georgia and Florida. Compare Exhibit "A" and "B" with Exhibit "C". The statutes of those two states have been upheld by the Supreme Court. Gregg; Proffitt. There remains, however, one obvious commission. The Florida statute requires that:

> "in each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (5) and (6) and upon the records of the trial and the sentencing proceedings."

Fla. Stat. §921.141 (3) (b) (1977). The Georgia sentencing procedure provides for a similar requirement. See Exhibit "B", (C). The Supreme Court in Gregg endorsed this procedure by stating that:

> (W)here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

Gregg, 428 U.S. at 195. Indiana, on the other hand, does not require the court or jury to submit written findings of fact based upon the aggravating or mitigating circumstances that may be present in each case.

On the same day that the Georgia and Florida death statutes were upheld in the Gregg and Proffitt decisions, the United States Supreme Court struck down as void the death sentence statutes of two other states. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). In Woodson, the Supreme Court stated that:

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> A seperate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion of capital sentences. Central to the limited holding in Furman was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.
>
> . . .
>
> North Carolina's death penalty statute provided no standards to guide the jury in the inevitable exercise of the power to determine which first degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of the death sentence. . . . [The North Carolina procedure, therefore,] does not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

Woodson, 428 U.S. 280, 302-3 (1976). Similarly, the Roberts Court held that "(t)he Louisana procedure neither provided standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion." 428 U.S. 325, 335 (1976). Consequently, the Supreme Court held as unconstitutional the death penalty procedures of Louisana and North Carolina.

Admittedly, the Indiana legislature included within its death statute a list of the generally accepted aggravating and mitigating circumstances which should guide the jury or court in its decision to impose death as a punishment. However, the legislature omitted the Furman and Gregg mandate that requires the court or jury to submit in writing its specific findings of fact based upon the aggravating and mitigating circumstances of each case. This unconstututional omission prevents the Indiana Supreme Court from making a rational review of the trial court's decision making process for imposing the sentence of death. Furthermore, the defendant is deprived of an opportunity to prove

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on appeal the jury's decision to impose death was based upon prejudicial, and non-statutory grounds. Likewise, the state is prevented from disproving the defendants allegation. Neither the defendant, nor the trial court, nor the Indiana Supreme Court has any idea how the jury arrived at its decision of death. Therefore, the death statute "fails to comply with Furman's requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences." Robert v. Louisana, 428 U.S. 325, 334, (1976). More importantly, the Indiana death sentence procedure remains in violation of the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution and Article 1 , $ 16 of the Indiana Constitution.

C.

Parts A and B above utilize the United State Supreme Court's own conceptualization of what constitutes "cruel and unusual" punishment; that is, the arbitrary and capricious infliction of death as a punishment. But the word "cruel" has cognitive meaning only in relation to those things which are not cruel. The word "unusual" is also a relative term. To derive any meaning from the word "unusual", one must relate the subject under study to a scale of time. In other words, the word "unusual" has cognitive meaning only in a time-scale relation to those things which are not usual.

During the years listed below, the State of Indiana has arbitrarily, wantonly, and capriciously killed the following number of human beings.

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1930.....1	1955.....0
1931.....1	1956.....0
1932.....2	1957.....0
1933.....3	1958.....0
1934.....4	1959.....0
1935.....2	1960.....0
1936.....2	1961.....0
1937.....5	1962.....1
1938.....8	1963.....0
1939.....3	1964.....0
1940.....0	1965.....0
1941.....1	1966.....0
1942.....1	1967.....0
1943.....0	1968.....0
1944.....0	1969.....0
1945.....1	1970.....0
1946.....1	1971.....0
1947.....0	1972.....0
1948.....0	1973.....0
1949.....3	1974.....0
1950.....1	1975.....0
1951.....1	1976.....0
1952.....0	1977.....0
1953.....0	1978.....0
1954.....0	1979.....0

See, Furman v. Georgia, 408 U.S. 238, 374 (1972)(Appendix III To Opinion of Marshall, J., concurring); Adams v. State, 259 Ind. 64,___, 271 N.E.2d 425, 437 (1971) (DeBruler, J., dissenting)

To say that the infliction of death as a criminal sanction in Indiana is a "usual" form of punishment, is to ignore the facts. "How much rarer, after all, could the infliction of death be?" Furman, 408 U.S. at 294 (Brennan, J., concurring).

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II

> The Indiana Death Sentence violates Article 1, Section 18 of the Indiana Constitution. This Constitutional provision mandates that "the penal code shall be founded on the principles of reformation, and not of vindictive justice."

The Indiana Supreme Court upheld the constitutionality of the death sentence by a vote of three to two in the case of Adams v. State, 259 Ind. 64, 271 N.E.2d 425 (1971). To the appellant's constitutional challenge of the death sentence the Adams majority responded that "we feel the question in our jurisdiction hardly needs to be discussed. . . ." Id. at 430. It is shocking that the highest court in this state would say that whether a man lives or dies is a "question in our jurisdiction (which) hardly needs to be discussed. . . ." Id. The Adams Court soon found that the United States Supreme Court disagreed with such a position. Furman v. Georgia. Consequently, the Adams majority was forced to retract its decision. 259 Ind. 164, 284 N.E.2d 757 (1972). The Court, however, has yet to have the opportunity to decide on the constitutionality of the new death sentence procedure in Indiana. This Court has a rare opportunity to first decide the merits of the present constitutional challenge of Indiana's death sentence.

In the first appeal by Adams, 259 Ind. 64, 271 N.E.2d 425 (1971), Justice DeBruler points out in an excellent concurring and dissenting opinion that the Indiana Constitution stands alone amongst those of her sister states. Article 1, § 18 of the Indiana Bill of Rights provides that "(t)he penal code shall be founded on the principles of reformation, and not of vindictive justice."

> Whatever may be the case in other jurisdictions, in Indiana the Constitution explicitly sets out that at least one of the functions of punishment must be to reform the offender and that function is absolutely incompatible with the death penalty.

Id., 259 Ind. at ___, 271 N.E.2d at 431.

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In spite of the obvious, clear meaning of § 18, a slim majority of the Adams Court upheld the constitutionality of the death sentence. The majority of the Court found comfort and shelter in the doctrine of stare decisis by relying on the logic of such cases as Rice v. State, 7 Ind. 332 (1855), and Driskill v. State, 7 Ind. 338 (1855). However, as Justice DeBruler points out, the Driskill Court's opinion that the death penalty is not vindictive, but is even-handed justice, is simply absurd.

> It might mean that the death penalty is not vindictive because it is the taking of the life of the offender who has himself taken a life. This would be the same as claiming that the 'eye for an eye' philosophy is not vindictive, when in fact it is the epitome of vindictiveness and revengefulness. The exclusive use of the 'eye for an eye' philosophy is precisely what is precluded by § 18. Whatever it might have meant to the judge who wrote it, this statement that the death penalty is even-handed justice is not an argument at all. . . .

271 N.E.2d at 432. Justice Prentice joined in the rejection of the majority's reliance on illogical precedent by stating that:

> Whatever may have been the circumstances in 1855 motivating us to the decisions reached in Rice and Driskill, it is clear that we should not be governed by such mish-mash. . . . There are many things in law that are so because we say they are so, but there are limits. Death, as punishment for a crime, any crime, cannot be other than vindictive, whatever may be the meaning of 'even-handed justice.' There can be no basis for denying that the death penalty offends against Article 1, § 18, except by reliance upon these cases as precedent, and they are, . . . built on a foundation that did not exist. The doctrine of stare decisis itself compels us to abandon it when it does not serve the objectives of sense and justice.

271 N.E.2d at 444.

In any event, the majority of the Adams Court did not even address itself to the first part of § 18; that is, "(t)he penal code shall be founded on principles of reformation. . . ."

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The reason the Adams majority was silent on this question is because one simply cannot argue that the taking of a life fulfills a rehabilitative function. As Justice Stewart stated in Furman:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

408 U.S. at 306. Or as Justice Brennan puts it:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to be free of cruel and unusual punishment, and to treatment as a 'person for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. . . . (But an) executed person has indeed lost the right to have rights. As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end to our relations with him. His execution is a way of saying 'You are not fit for this world, take your chances elsewhere.'

Id. at 290.

"Section 18 (of the Indiana Constitution) merely precludes a penalty which forecloses all possibility of reformation of the offender." Adams, 271 N.E.2d at 432 (DeBruler, J., concurring and dissenting). It is absurd for the Adams majority to even imply that the death penalty fulfills any sort of principle of reformation. Furthermore, a sentence of death can only be construed as nothing but vindictive justice. Therefore, the death penalty in this state is in direct violation of Article 1, § 18 of the Indiana Constitution.

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CONCLUSION

The statutory procedure in Indiana grants to the prosecuting attorney an unconstitutional degree of discretion in his decision to seek the death penalty. Furthermore, the present statutory scheme does not provide an opportunity for the Indiana Supreme Court to rationally review the decision making process of the trial court's infliction of a sentence of death. Moreover, the execution of a human being in Indiana is a highly unusual and cruel punishment. The Indiana death penalty procedure does not comply with the Furman mandate of the Supreme Court, and is therefore in direct violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, § 16 of the Indiana Constitution.

Article 1, § 18 of the Indiana Constitution implicitly precludes the Indiana legislature from authorizing death as a criminal punishment. Therefore, the death penalty in Indiana is an unconstitutional penal sanction.

This Court must fulfill its sworn duty to uphold the Constitutions of this State, and of this Nation. The defendant respectfully moves this Court to dismiss, as unconstitutional, Count IV: The Indictment for the Death Penalty. In the words of Justice Douglas:

> The high service rendered by the 'cruel and unusual' punishment clause of the Eigth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Furman v. Georgia, 408 U.S. at 256.

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STATE OF INDIANA)
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LARRY WILLIAMS, et. al.) FLORIDA DEATH PENALTY STATUTE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

1. Seperate proceedings on issue of penalty.--Upon conviction or adjudication or guilt of a defendant of a capital felony, the court shall conduct a seperate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceedings shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any heresay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured

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in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

2. Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

3. Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring

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the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

4. Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other causes and shall be heard in accordance with rules promulgated by the Supreme Court.

5. Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

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(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

6. Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime. Amended by Laws 1972, c. 72-724, $9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, $1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, $248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, $1, eff. Aug. 3, 1977

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EXHIBIT A

STATE OF INDIANA)
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VS)
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LARRY WILLIAMS, et. al.) GEORGIA DEATH PENALTY STATUTE

27-2534.1 Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstance which may be supported by the evidence.

1. The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

2. The offense of murder, rape armed robbery, or kidnapping was committed while the offender was engaged in the commission of burglary or arson in the first degree.

3. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

4. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

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EXHIBIT E

5. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

6. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

7. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

8. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

9. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

10. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in case of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp159, 163.)

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EXHIBIT E

STATE OF INDIANA)
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LARRY WILLIAMS, et. al.) INDIANA DEATH PENALTY STATUTE

35-50-2-9. Death sentences.-- (a) The state may seek a death sentence for murder by alleging, on a page seperate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law-enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

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EXHIBIT C

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

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EXHIBIT C

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentences shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review. (I.C. 35-50-2-9, as added by Acts 1977, P.L. 340, § 122, p. 1533.)

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EXHIBIT C

STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT

1980 TERM

STATE OF INDIANA)
)
vs.)
)
LARRY WILLIAMS, LARRY)
PERKINS, AND GEORGE REDMAN)

Cause No. 4807-C

ORDER

This matter having been submitted to the court on the 21st day of April, 1980, on the motion to dismiss death penalty request hereinbefore filed by the defendant, Larry Williams; and the court having taken the matter under advisement for consideration and determination of the findings; and the court now being sufficiently advised in the premises; the court does hereby find that the defendant's motion to dismiss death penalty request should be denied for the reasons set out in the memorandum attached hereto and made a part of this order.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED by the court that the motion to dismiss death penalty request hereinbefore filed by the defendant, Larry Williams, be, and the same is, hereby denied.

DATED this 12th day of May, 1980.

Judge of the La Porte Circuit Court

cc: David R. Holmes
Jere L. Humphrey

FILED
IN OPEN COURT
MAY 12 1980
CLERK OF LA PORTE CIRCUIT COURT

MEMORANDUM

FACTS: On January 30, 1980, defendants Larry Williams and George Redman were indicted for the murder of Jesse L. Hubbard. Count V of the indictment requested that the death penalty be imposed should defendants be convicted of murder. On February 12, 1980, defendant Williams filed a motion to dismiss the death penalty request. On April 18, 1980, defendant Redman filed a similar motion. Both defendants contend that the Indiana death penalty statute is unconstitutional for the following reasons:

(1) The death penalty statute grants the county prosecutor an unconstitutional degree of discretion in selecting cases for which the state will seek the death penalty.

(2) The death penalty statute does not provide meaningful appellate review of the death penalty.

(3) The death penalty is cruel and unusual punishment.

A hearing was held on defendants' motions on April 21, 1980; and the court took the matter under advisement. The court now renders its decision on the merits of defendants' motions.

HOLDING: Defendants' motions to dismiss are DENIED.

ANALYSIS: I. The Indiana death penalty statute provides as follows:

> The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

IC 835-50-2-9(a).

Defendants contend that the decision to seek the death penalty is in the unchecked discretion of the prosecutor, which leads to the arbitrary and wanton application of the death penalty. Defendants contend that the grant of prosecutorial discretion in requesting the death penalty results in a violation of defendants' Fifth Amendment right not to plead guilty and Sixth Amendment right to a jury trial. Defendants assert that the threat of death is used in the plea negotiation process, thus needlessly encouraging or coercing defendants to submit to a plea agreement under which the death penalty would not be imposed.

The court finds that the Indiana death penalty statute does not violate the Fifth and Sixth Amendments of the U.S. Constitution. The thrust of defendants' motions is to attack the power of the prosecutor during plea negotiations. The Indiana Supreme Court recently recognized that a prosecutor's threat to reindict the defendant on a greater charge (habitual criminal count) and face a more severe sentence if the defendant did not plead guilty to a lesser offense was a permissible exercise of prosecutorial discretion. McMahan v. State, ___ Ind. ___, 382 NE2d 154 (1978). Relying on and quoting the U.S. Supreme Court's decision in Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the court stated:

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternative of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process clause of the Fourteenth Amendment.

382 NE2d at 156.

The same reasoning applies to burdens that may be placed on Fifth and Sixth Amendment rights. In Bordenkircher, the U.S. Supreme Court stated:

> While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices (is) an inevitable'— and permissible — 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' Chaffin v. Stynchcombe (412 U.S. 17,31, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973). It follows that, by tolerating and encouraging the negotiation of pleas, this court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

434 U.S. at 264, 98 S.Ct. at 668.

Thus, it is evident that the U.S. Supreme Court has sanctioned the use of plea negotiations to reduce the punishment that may be imposed on a defendant. The cornerstone, however, of plea negotiations is that the defendant is fully informed and well counseled of the circumstances of a plea agreement or the refusal to enter into a plea agreement.

The court recognizes that this case involves the death penalty — a form of punishment which is "unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153,187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Nevertheless, there are safeguards built into our system of criminal justice to prevent the abuse of the prosecutor's discretion in threatening to seek the death penalty. Under IC 35-4.1-1-4, the trial court must determine if a plea of guilty was voluntarily made. The court must also determine if a factual basis for a plea of guilty exists before accepting it. Thus, a plea of guilty pursuant to a plea agreement will not be accepted if it was involuntarily made or coerced. Nor will a plea of guilty be accepted if a factual basis for the plea is lacking. This statute therefore permits the court to investigate the circumstances of a plea agreement and determine if the plea is a product of an impermissible exercise of the prosecutor's discretion.

The only available alternative to the present death penalty statute's provision for prosecutorial discretion is that the prosecutor be given no discretion at all. In that case, the judge will be the sole determiner of whether the death penalty will be imposed. Under such an arrangement, a defendant charged with murder will be subject to the death penalty in every case, assuming that evidence of aggravating circumstances is presented. Under the present statute, the defendant is given the power to avoid death by pleading guilty, assuming there is a factual basis for such a plea, or by compromising on some issue with the prosecutor in the event the case goes to trial. For example, the defendant could agree to forego asserting a particular right in exchange for the prosecutor's agreement not to seek the death penalty. Thus, the statute also gives the defendant a bargaining point in the plea negotiation process.

The recent decision of the Illinois Supreme Court in People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 NE2d 809 (1979), supports this court's finding. Under an Illinois statute, the death penalty could not be imposed unless it was requested by the prosecutor after the defendant had been convicted of murder. Ill. Statute Ch.38 §9-1(d). The court found that such discretion vested in the prosecutor was not violative of the Due Process clause, Eighth Amendment, or the separation of powers provision of the Illinois Constitution.

Also supportive of this court's decision is Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), which upheld the constitutionality of the sentencing scheme under the New Jersey homicide statutes. The court held that the statutes, which provide for mandatory punishment of life imprisonment for a defendant convicted by a jury of first-degree murder, but also allow the possibility of a sentence of less than life imprisonment for a defendant who enters a plea of non vult (defendant will not contest it), does not impose an unconstitutional burden on a defendant's rights under the Fifth, Sixth, and Fourteenth Amendments. The court cited Bordenkircher as authority for supporting its decision in Corbitt.

The court, in discussing U.S. v. Jackson, 390 U.S. 571, 88 S.Ct. 1209, 20 L.Ed.2d (1968), on which defendants in the present case rely, stated that its decision may have been altered if the New Jersey statute required the imposition of the death penalty. 99 S.Ct. 496-97. The court in Corbitt distinguished Jackson on the basis that in Jackson the defendant could avoid the death penalty by pleading guilty, whereas in Corbitt the defendant did not necessarily avoid the maximum penalty (life imprisonment) by pleading non vult.

In the present case, defendants cannot necessarily escape the death penalty by pleading guilty and accepting a term of imprisonment pursuant to a plea agreement. The trial court, under IC 835-4.[illegible] retains the authority to refuse to accept a plea of guilty if it is not voluntarily made or a factual basis for it is lacking. In such a situation, the case will proceed to trial, and the prosecutor may request that the death penalty be imposed. Thus, the present case falls into a similar exception to Jackson that Corbitt presented.

Based on the foregoing reasons, defendants' motions to dismiss death penalty request are denied.

II. Defendants' contentions that the Indiana death penalty statute does not provide for meaningful appellate review is without merit. IC 835-50-2-9(h) provides that a "death sentence is subject to automatic review by the supreme court" of Indiana. This review will consist of an examination of the entire trial court record. From this review, it may be determined what, if any, aggravating circumstances were found to justify the imposition of the death penalty.

III. The Indiana death penalty statute is not violative of the Eighth Amendment. The U.S. Supreme Court has held on numerous occasions that the death penalty is not per se cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 41 L.Ed.2d 859 (1976).

STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT

1980 TERM

STATE OF INDIANA,)
Plaintiff)
vs.) Cause No. 4807-C
LARRY WILLIAMS,)
Defendant)

RECOMMENDATION

We, the jury, recommend to the court that the death penalty should be imposed.

James O. Fish
Foreman

DATED: July 17, 1980

FILED
IN OPEN COURT
JUL 17 1980
Clerk

123/159

STATE OF INDIANA)
)SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT

1980 TERM - CAUSE NO. 4807C

FILED
IN OPEN COURT

AUG 25 1980

CLERK OF LAPORTE CIRCUIT COURT

STATE OF INDIANA

VS

ORDER

LARRY WILLIAMS

The above entitled cause having come on for sentencing on the 25th day of August, 1980 and the State of Indiana appearing by Fred R. Jones and Rick Huff, Deputy Prosecuting Attorneys for the County of Marshall, Indiana, and the defendant, Larry Williams, now appears in person and with his attorney, Jere L. Humphrey, and the court having found that the defendant is twenty-two (22) years of age and the jury having found that the defendant is guilty on the 17th day of July, 1980 of the offenses of Murder, Felony Murder, Armed Robbery, a class "A" felony, Conspiracy to Commit Armed Robbery, a class "A" felony as charged in the indictments and of the offenses of Habitual Offender, and the court having entered Judgment of Convictions for said offenses, and having considered the pre-sentence investigation report heretofore filed by the probation department of this court, finds that the defendant should be committed to the custody of the Department of Corrections for classification and confinement in a maximum security facility, and all sentences to run consecutive as follows:

1) For the offense of Conspiracy to Commit Armed Robbery, a class "A" felony for a period of thirty (30) years;

2) For the offense of Armed Robbery, a class "A" felony, for a period of thirty (30) years;

3) For the offense of Felony Murder, for a period of ninety (90) years;

4) For the offense of Habitual Offender for a period of thirty (30) years;

5) For the offense of Murder the defendant should be sentenced to death and such execution should be before sunrise on the 12th day of January, 1981.

The Court further finds that the defendant is indigent and that the costs in the sum of $63.00 should be taxed against the defendant; however, the defendant being indigent shall not be imprisoned for failure to pay any such costs.

IT IS FURTHER ORDERED AND DECREED By the Court that the defendant be given credit towards service of sentence for two-hundred and eight (208) days spent in confinement as a result of the conduct on which the charge is based.

The Court rendurs these sentences for the reasons that the imposition of any lesser sentence would depreciate the seriousness of the crime; that the jury has expressed, on behalf of our society, a moral concern about the crimes committed in our society which we consider as atrocious crimes; that for some crimes that are especially heinous, our jury again has expressed a belief that "to fight fire with fire" is an appropriate response for our society to make.

The defendnt is remanded to the custody of the sheriff of La Porte County, Indiana for transportation to the Department of Corrections, for the execution of the foregoing judgment.

Comes now the court and advises the defendant of his rights regarding appeal of this conviction and sentence. The defendant now indicates his desire to appeal this conviction. Court finds that the defendant is an indigent person and is entitled to the appointment of a pauper attorney for the purposes of prosecuting an appeal. The court further finds that the appointment should be deferred until such time as the defendant's motion to correct errors has been filed and determined by this court.

DATED this 25th day of August, 1980.

Judge, La Porte Circuit Court

STATE OF INDIANA)		IN THE LAPORTE CIRCUIT COURT
)	SS:	
COUNTY OF LAPORTE)		1980 CALENDAR TERM
STATE OF INDIANA)		CAUSE NO. 4807 C
)		
VS)		
)		
LARRY WILLIAMS)		MOTION TO CORRECT ERRORS AND SUPPORTING MEMORANDUM

Comes now Counsel for the Defendant and moves the Court to correct the following errors of law occurring at the trial for the following reasons:

I.

THE TRIAL COURT COMMITTED AN ERROR OF LAW IN REFUSING TO DISMISS THE DEATH PENALTY REQUEST AND IN ULTIMATELY IMPOSING THE DEATH SENTENCE BECAUSE THE INDIANA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18 OF THE INDIANA CONSTITUTION.

The constitutional arguments against the death penalty are set out in Subparagraphs A through D immediately following.

A.

The Indiana Death Penalty Statute, I.C. 35-50-2-9, is unconstitutional in the way it selects those for whom the death sentence is sought.

First, the Statute is unconstitutional because of the arbitrary and capricious manner in which victims are selected. The Statute provides:

> State may seek a death sentence for murder by alleging on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed . . . . I.C. 35-50-2-9 (emphasis added)

The decision to seek the death penalty is solely up to the Prosecutor. There are no guidelines for him to follow in determining when to seek the death penalty. Such unchecked discretion in the hands of one public official has been condemned by the United States Supreme Court:

> Rather, we deal with a system of law and of justice that leaves to the uncontrolled dis-

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> cretion of Judges or juries the determination whether the defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die dependent upon the whim of one man or twelve. Furman v Georgia, 408 U.S. 238 (1972), 253 (Douglas J.)

The arbitrariness complained of in Furman is rife in the Indiana Statute, and the potential for abuse is large. Surely, if this Statute existed in Alabama, and if the County Prosecutor requested the death penalty only for blacks, which he could legally do under the Statute, there could be no question that the first Federal Court to review the Statute would declare it unconstitutional. Prejudice, latent or manifest, is not restricted to any geographical region. Further, it takes very little imagination to envision other arbitrary applications inherent in the Indiana Statute: a Prosecutor in one county may be more or less philosophically opposed to the death penalty; a Prosecutor in one county may, because of circumstances peculiar to his own personality and life experiences, be more or less eager for the death penalty in certain circumstances; the Prosecutor may or may not seek the death penalty because of an election year. The examples are many. The net result is that whether a defendant lives or dies may depend upon the county in which he committed the offense. It is still up to the "whim of one man" to decide who lives and who dies. Such arbitrariness in the selection is an unconstitutional violation of the Due Process Clause because it is cruel and unusual punishment:

> It would seem to be incontestible that the death penalty inflicted on one defendant is unusual if it descriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. Furman at 242.
>
> That the requirements of Due Process ban cruel and unusual punishment is now settled. Id. at 241.

The evil mentioned by Justice Douglas of "a procedure that gives room for the play of prejudices", exists in the Indiana Statute because of the unfettered discretion of the Prosecutor's

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judgment in seeking the death penalty. In speaking of discretionary Statutes, Justice Douglas stated:

> They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on cruel and unusual punishments.
>
> Any law which is nondiscriminatory on its face may be applied in such a way as to violate the equal protection clause of the 14th Amendment.

Therefore, the mere fact that the statute is capable of being applied in an unconstitutional way, is sufficient to make the statute unconstitutional. There can be no doubt that there is an enormous opportunity for discrimination within a county and among the 92 counties.

No doubt, to meet the above argument the State will argue that discretion exists throughout our criminal justice system and point out many illustrations where the Prosecuting Attorney has discretion. Defendant concedes discretion is important and necessary in many areas of law enforcement. However, when the death penalty enters the picture it is time for discretion of the Prosecutors to stop. Death cases have been recognized and treated as a class apart from other criminal cases:

> It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations. Griffin v Illinois, 351 U.S. 12, 100 L. ed 891, 76 S. Ct. 585.
>
> This court too, almost always treats death cases as a class apart. Furman, 408 U.S at 286, 287, 33 L. ed 2d 346 at 376 (Brennan, J. concurring)
>
> The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Id.

Therefore, it will not due to apply the discretion of the Prosecuting Attorney in all other cases, to the death penalty case. As the previous passages indicate, when the death penalty is involved it becomes, to use the vernacular, a whole new ball game.

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It becomes then a time for arbitrariness and unchecked power to depart and the control of law to enter.

In those states whose death penalty statutes have been passed upon by the United Stafes Supreme Court, none leaves the initial death penalty request up to the discretion of the Prosecuting Attorney. The Florida Statute, upheld in Profitt v Florida, 428 U.S. 242 (1976), 49 L. ed 913, 96 S. Ct. 2960, provided that anyone who committed murder in a certain manner was a candidate for the death penalty. It was not up to the Prosecuting Attorney to decide whether to ask for the death penalty. The Florida Statute then provided for a second hearing, similar to Indiana's, in order to determine if mitigating circumstances outweighed the aggravating circumstances in order to determine whether life imprisonment or death should be imposed. The Georgia Statute, unheld in Gregg v Georgia, 428 U.S. 153 (1976), 49 L. ed 2d 859, 96 S. Ct. 2909, had a similar provision for the bifurcated procedure to determine the death penalty. But, here again, there existed no discretion on the part of the Prosecuting Attorney to seek the death penalty. Also, the Texas Statute was upheld in Jurek v Texas, 428 U.S. 262 (1976), 49 L. ed 2d 929, 96 S. Ct. 2950. That Statute also incorporated the bifurcated procedure with the jury and judge, in accordance with statutory criteria, determining whether life imprisonment or death should be imposed.

The Indiana Statute is similar to Georgia, Florida and Texas in that it requires the Judge and jury to take into consideration aggravating/mitigating factors in a bifurcated proceeding. It is dissimilar in that the Indiana Statute alone allows the Prosecuting Attorney the discretion to himself choose which defendants will be subject to the death penalty.

Examples can also be derived from other neighboring States. In Illinois, the death penalty statutory scheme provides that:

> In any case in which the defendant is convicted of murder, the State shall seek imposition of the

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> death penalty in all cases where any of the aggravating circumstances obtain ... . . Ill. Rev. Stat. ch. 38 § 1005-8-1A (1973) (emphasis added)

More to the point, from 1975 until 1978, Kentucky had a statutory scheme almost identical to that of Indiana. The relevant Kentucky Statute provided that:

> Murder is a Class A Felony, except that in the following situations it is a capital offense . . . . Ky. Rev. Stat. Ann. § 507.020 (2) (Baldwin 1975)

Those situations that made murder a capital offense were simply a list of the generally accepted aggravating circumstances. The procedure was therefore, similar to Indiana's in that the only way for murder to be designated a capital offense was for the Prosecutor to take the further procedural step to seek the death penalty. However, the Kentucky Statute provided explicitly that:

> However, any crime classified as a capital offense may, at the discretion of the State, be prosecuted as a Class A. Felony . . . . Id. at 532.030 (1)

Kentucky amended this Statute in 1978, by deleting the prosecutor's discretion and providing that:

> Murder is a capital offense. Id. at 507.020 (2)
>
> When a person is convicted of a capital offense he shall have his punishment fixed at death or imprisonment . . . . Id. at 532.030 (1)

In conclusion, the Indiana Death Penalty Statute is unconstitutional because it lends itself to arbitrary application within the same county and among the 92 counties and violated Due Process.

B

The Indiana Death Penalty Statute is unconstitutional because it places an unconstitutional burden upon ~~the~~ a defendant's right to a jury trial under the Sixth and Fourteenth Amendments and his right against self incrimination under the Fifth and Fourteenth Amendments of the U.S. constitution

The Indiana statutory scheme, by granting discretion to the Prosecuting Attorney in seeking the death penalty, denies due

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process to a defendant because of unconstitutional burdens upon a defendant's Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial.

In United States v Jackson, 390 U.S. 570 (1968), the Supreme Court held the death penalty provision in the Federal Kidnapping Act to be unconstitutional because the statute operated to needlessly burden the defendant's Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial.

Under the Kidnapping Act, a defendant could be sentenced to death only if a jury recommended the death penalty. If a defendant pled guilty, the threat of death was removed because only the jury could impose death. The Court held:

> the inevitable fact of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose of effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional . . . .
>
> Whatever might be said of Congress' Objectives, they cannot be pursued by means that needlessly chill the exercise of basic Constitutional rights . . . . [f]or the evil in the Federal Statute is not that it necessarily coerces guilty pleas and jury waivers, but simply that it needlessly encourages them. 390 U.S. at 581-583 (emphasis original)

The Indiana Statutory Scheme allows for the chilling of Fifth and Sixth Amendment rights because it places in the hands of the Prosecutor the power to encourage guilty pleas by seeking or not seeking the death penalty. At the very least, the Prosecutor through this "Statutory Scheme" can certainly encourage guilty pleas and no doubt a good case can be made that it actually coerces them.

The Statutory Scheme that allows this result was precisely what was condemned in Jackson, not the death penalty itself. The scheme established by the Indiana Legislature permits the exercise of prosecutorial discretion as an impermissible lever against the defendant to encourage a waiver of Fifth and Sixth

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Amendment rights and, therefore, runs afoul of the proscription of Jackson, supra.

In a more recent case, Corbitt v New Jersey, (1978), 439 U.S. 212, 58 L. ed 2d 466, 99 S. Ct. 492, the Supreme Court had before it a New Jersey statutory scheme wherein a defendant convicted of first degree murder by a jury must receive a life sentence, but a defendant who pled guilty was eligible for a term of not more tha thirty (30) years. The Court upheld the Statute because even though a Judge accepting a plea may impose the thirty (30) years, yet, he may also impose the life imprisonment term.

Even though the Court upheld the statute, nevertheless, the case lends strong support for the unconstitutionality of the Indiana Death Penalty. More particularly, the Court hinted that had the Death Penalty been involved, the case may have been decided differently:

> First, the Death Penalty, which is "unique in its severity and irrevocability", Gregg v Ga., 428 U.S. 153, 187, 49 L. ed. 2d 859, 96 S. Ct. 2909 (1976), is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey Law the maximum penalty for murder is life imprisonment, not death. Id. at 217.
>
> Unlike the Statute at issue in the Jackson case, the death penalty is not involved here . . . . Id. at 226. Concurring opinion Stewart, J.

Therefore, there is a strong hint that the fact that had the death penalty been involved, the decision may well have been different.

The Corbitt case can also be distinguished because the rationale for upholding the different treatments was that the Judge nevertheless had the choice to impose a sentence equal to the sentence imposed by the jury:

> Furthermore, in Jackson, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds the defendant guilty of first degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the Judge accepting the plea has the authority to impose a life term. Id. at 217.

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The Indiana Death Statute does not allow for judicial override because if the Prosecutor never seeks the death penalty, then the judiciary does not have the punishment arsenal equivalent to what the Prosecutor has in asking for the death penalty on certain defendants.

C

The Indiana Death Penalty Statute is also unconstitutional because it does not provide for meaningful review.

The first constitutional deficiency in the review process occurs at the trial level in the penalty phase of the bifurcated proceeding. The jury is required to utilize in its deliberation, the statutorily defined list of aggravating/mitigating circumstances and recommend a death sentence if it finds beyond a reasonable doubt the existence of one of the aggravating circumstances alleged that is not outweighed by any mitigating circumstances. Unlike the sentencing authorities of Florida and Georgia, an Indiana jury is not required to submit a written justification for its decision to recommend death. Unlike a Texas jury, an Indiana jury is not required to answer three (3) specific questions concerning the elements of the events and the characteristics of the offender.

Thus, upon review, the Indiana Supreme Court is deprived of a trial record that clearly and specifically states the reasoning behind the decision to impose the death sentence. The Court can never truely be sure that the Judge or jury took into consideration only the statutorily defined aggravating circumstances rather than some other capricious or impermissible circumstance, such as the race or social position of the defendant. Furthermore, without the requirement of the written justification, the trial record will not show what weight was given any existing mitigating circumstances and why the aggravating circumstances outweighed the mitigating circumstances.

In addition, the Statutes of Georgia, Florida, and Texas have an extra safeguard in the form of an automatic commutation clause. In those States, if the Judge or jury fails to comply with

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the statutory requirements of clear justification of its decision to impose death, an automatic life sentence is imposed. Since, in Indiana, the Judge or jury is not required to either submit a written justification or to answer specific questions, no comparab safeguard exists. Furthermore, the statute does not provide any procedure as to how the trial court should record its decision making process. Thus, it is evident that the Indiana Statute neither adopts nor requires the procedures necessary to create at the trial level a clear and specific record upon which the State Supreme Court can base a rational review. The end result is the promulgation of the decision making system of imposing death by:

> No meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases which it is not. Furman, 408 at 313 (White, J. concurring)

The deficiency in the Indiana Statute is highlighted in comparison with the Statutes of Georgia, Florida and Texas. In Georgia, the State Supreme Court must determine what the death sentence is:

> Excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Ga. Code An. § 27-2537 (c) (3) (Supp. 1975).

The Georgia court is required to consider several sources of information such as the Trial Court record and a detailed questionaire submitted by the Trial Judge. Id. at (a).

Furthermore, statistics are derived from comparative data accummulated specifically by the newly created post of Assistant to the Supreme Court. Id. at (f)-(h). Moreover, it is decision is to affirm a death sentence, the Georgia Supreme Court is required to make reference to similar cases it has recently considered. Id. (e).

Utilizing these legislatively established Appellate Review Procedures, the Georgia Supreme Court has, on several occasions, but aside death sentences. The most prevelant reason to vacate a death sentence was because it was excessive or dispro-

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portionate in comparison to sentences imposed in a significant number of factually similar cases. See e.g. Dorsey v State, (1976) 236 Ga. 591, 225 S.E. 2d 418; Jarrell v State, (1975), 234 Ga. 410, 216 S.E. 2d 258; More v State, (1975), 233 Ga. 861, 213 S.E. 2d 829; Floyd v State, (1974) 233 Ga. 280, 210 S.E. 2d 810; Conley v State, (1974), 231 Ga. 829, 204 S.E. 2d 612. After reviewing the procedures thus established, the United States Supreme Court concluded that Georgia now provides:

> The further safeguard of meaningful Appellate Review (2) ensure that death sentences are not imposed compreciously or in a freakish manner. Gregg, 403 U.S. at 195.

Although the review procedures of Florida and Texas are not as comprehensive, the Supreme Court favorably noted that all three state courts have not hesitated to vacate a death sentence when each court had independently determined the sentence should no have been imposed. In each state, the decision to vacate a death sentence is essentially derived from a comparative analysis between cases to insure that:

> The aggravating and mitigating) reason present in one case will reach a similar result to that reached under similar circumstances in another case. Profitt, 428 U.S. at 253.

Previous case law and the Indiana Death Penalty Statute do not state exactly what procedures the Indiana Supreme Court has adopted to insure meaningful Appellate Review. The only requirement established by the Statute is that the review be "automatic and expedient".

The void in the Indiana Statute is significant. Unlike Georgia, Indiana does not statutorily provide for elaborate and extensive information gathering system upon which the Supreme Court can base a rational comparasion of factually similar cases both within the county itself, and among the 92 different counties in Indiana. Moreover, unlike Florida or Texas, the Indiana Supreme Court has not adopted procedures necessary to develop a comparative analysis. Until such a system is developed, the Indiana Death Penalty Statute cannot pass constitutional requirements under

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the Eighth and Fourteenth Amendments as construed in Furman and its progeny.

D

The Indiana Death Sentence violates Article I, Section 18 of the Indiana Constitution. This Constitutional provision mandates that "the penal code shall be founded on the principles of reformation, and not of vindictive justice".

The Indiana Supreme Court upheld the constitutionality of the death sentence by a vote of three to two in the case of Adams v State, 259 Ind. 64, 271 N.E. 2d 425 (1971). To the appellant's constitutional challenge of the death sentence the Adams majority responded that "we feel the question in our jurisdiction hardly needs to be discussed . . . ." Id. at 430. It is shocking that the highest court in this state would say that whether a man lives or dies is a "question in our jurisdiction (which) hardly needs to be discussed . . . ." Id. The Adams Court soon found that the United States Supreme Court disagreed with such a position. Furman v Georgia. Consequently, the Adams majority was forced to retract its decision. 259 Ind. 164, 284 N.E. 2d 757 (1972). The Court, however, has yet to have the opportunity to decide on the constitutionality of the new death sentence procedure in Indiana. This Court has a rare opportunity to first decide the merits of the present constitutional challenge of Indiana's death sentence.

In the first appeal by Adams, 259 Ind. 64, 271 N.E. 2d 425, (1971), Justice DeBruler points out in an excellent concurring and dissenting opinion that the Indiana Constitution stands alone amongst those of her sister states. Article 1, § 18 of the Indiana Bill of Rights provides that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."

> Whatever may be the case in other jurisdictions, in Indiana the Constitution explicitly sets out that at least one of the functions of punishment must be to reform the offender and that function is absolutely incompatible with the death penalty.

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Id., 259 Ind. at ___, 271 N.E. 2d at 431.

In spite of the obvious, clear meaning of § 18, a slim majority of the Adams Court upheld the constitutionality of the death sentence. The majority of the Court found comfort and shelter in the doctrine of stare decisis by relying on the logic of such cases as Rice v State, 7 Ind. 332 (1855), and Driskill v State, 7 Ind. 338 (1855). However, as Justice DeBruler points out, the Driskill Court's opinion that the death penalty is not vindictive, but is even-handed justice, is simply absurb.

> It might mean that the death penalty is not vindictive because it is the taking of the life of the offender who has himself taken a life. This would be the same as claiming that the 'eye for an eye' philosophy is not vindictive, when in fact it is the epitome of vindictiveness and revengefulness. The exclusive use of the 'eye for an eye' philosophy is precisely what is precluded by § 18. Whatever it might have meant to the judge who wrote it, this statement that the death penalty is even-handed justice is not an argument at all . . . . 271 N.E. 2d at 432.

Justice Prentice joined in the rejection of the majority's reliance on illogical precedent by stating that:

> Whatever may have been the circumstances in 1855 motivating us to the decisions reached in Rice and Driskill, it is clear that we should not be governed by such mish-mash. . . . There are many things in law that are so because we say they are so, but there are limits. Death, as punishment for a crime, any crime, cannot be other than vindictive, whatever may be the meaning of 'even-handed justice.' There can be no basis for denying that the death penalty offends against Article 1, § 18, except by reliance upon these cases as precedent, and they are . . . . built on a foundation that did not exist. The doctrine of stare decisis itself compels us to abandon it when it does not serve the objectives of sense and justice. 271 N.E. 2d at 444.

In any event, the majority of the Adams Court did not even address itself to the first part of § 18; that is, "[t]he penal code shall be founded on principles of reformation. . . ." The reason the Adams majority was silent on this question is because one simply cannot argue that the taking of a life fulfills a rehabilitative function. As Justice Stewart stated in Furman:

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> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. 408 U.S. at 306.

Or as Justice Brennan puts it:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to be free of cruel and unusual punishment, and to treatment as a 'person for purposes of due process of law and the equal protection of the laws.' A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable . . . . (But an executed person has indeed lost the right to have rights. As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end to our relations with him. His execution is a way of saying 'You are not fit for this world, take your chances elsewhere.' Id. at 290.

"Section 18 (of the Indiana Constitution) merely precludes a penalty which forecloses all possibility of reformation of the offender." Adams, 271 N.E. 2d at 432 (DeBruler, J., concurring and dissenting). It is absurd for the Adams majority to even imply that the death penalty fulfills any sort of principle of reformation. Furthermore, a sentence of death can only be construed as nothing but vindictive justice. Therefore, the death penalty in this state is in direct violation of Article I, § 18 of the Indiana Constitution.

CONCLUSION

The statutory procedure in Indiana grants to the prosecuting attorney an unconstitutional degree of discretion in his decision to seek the death penalty. Furthermore, the present statutory scheme does not provide an opportunity for the Indiana Supreme Court to rationally review the decision making process of the trial court's infliction of a sentence of death. Moreover,

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the execution of a human being in Indiana is a highly unusual and cruel punishment. The Indiana Death Penalty procedure does not comply with Furman mandate of the Supreme Court, and is therefore, in direct violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, § 16 of the Indiana Constitution.

Artile I, § 18 of the Indiana Constitution implicitly precludes the Indiana Legislature from authorizing death as a criminal punishment. Therefore, the death penalty in Indiana is an unconstitutional penal sanction.

This Court must fulfill its sworn duty to uphold the Constitutions of this State, and of this Nation. The defendant respectfully moves this Court to dismiss, as unconstitutional, Count IV: The Indictment for the Death Penalty. In the words of Justice Douglas:

> The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, non-selective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. Furman v Georgia, 408 U.S. at 256.

II

The Court committed an error of law by permitting cross-examination of the witness Perkins to bring out the fact that Larry Williams had been charged in another murder case.

Initially, the Court granted Defendant Attorney's Motion in Limine keeping from jury the previous murder conviction of the defendant, Larry Williams. However, after Counsel brought up the fact that Perkins was testifying pursuant to a plea agreement in the instant case, the State was allowed to elicit the fact that the State's plea agreement also encompassed the previous trial for murder in which both Perkins and Williams were involved. The Deputy Prosecuting Attorney was allowed to inject the matter as follows:

> Redirect examination of witness by Ralph Huff-Deputy Prosecuting Attorney:

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Q. Directing your attention to this plea agreement that Mr. Williams is asking you about, Are you testifying today as a result of that plea agreement?

A. Yes.

Q. And also, pursuant to that agreement, ah, did you testify in another murder trial, in Fulton County Court?

Mr. Humphrey: I'll object. It is not relevant at all.

Court: Objection overruled, you may answer.

A. Yes.

Q. Who was the defendant in that trial?

Mr. Humphrey: Same objection.

Court: Overruled, you may answer.

A. Larry Williams.

The fact that Larry Williams was involved in another murder trial was not relevant, but was in fact, extremely prejudicial. It was certainly proper for Defense Counsel to inquire into the plea agreement in order for the jury to assess the credibility of the witness. Newman v State, (1975) 263 Ind. 569, 334 N. E. 2d 684. The State's argument that the jury must know the obligation of the Defendant in order to know what his gain is, is merely a backdoor approach to placing before the jury the impermissible evidence, a trap the Trial Judge fell into. It is just not logical that the jury needs to know he testified against Williams in another murder trial in order to assess his gain. The testimony on this point was irrelevant in an extremely prejudicial way. Since prior crimes are not permissible, Maldonado v State, (1976), 265 Ind. 492, 355 N.E. 2d 843, this case must be reversed and remanded.

III

The Court erred in permitting testimony of defendant's wife over a claim of privilege.

Sherri Williams, wife of the Defendant, Larry Williams, was allowed to testify in this trial as follows:

Q. Did there come another time, when you were at, hum, Larry Williams' mother's residence on West Harrison Street in Plymouth, Indiana, with

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the defendant, Larry Williams, when he received a phone call?

A. Yes I was.

Q. At approximately when would this have been?

A. I'm not sure.

Q. O.K. do you think about what month it was?

A. April I think.

Q. Of '79?

A. Yes.

Q. Did Larry initiate this phone conversation or did someone call him?

A. Someone called him.

Q. And did he in fact talk to this person on the phone?

A. Yes he did.

Q. And what did he say to that person on the phone?

Mr. Humphrey: I'll object to the privilege.

Court: Objection, overruled you may answer.

Q. What did he say to that person on the phone?

A. Ah, I didn't hear the whole conversation, all that I heard was that him and Larry Perkins would be on later, over later.

Q. O.K., and when you say "him" who was the "him" who was speaking?

A. Larry.

Q. Larry Williams?

A. Yes.

The above evidence establishes that no one was present but Defendant and his wife at the time the conversation was made.

In the above exchange, what was privileged was the verbal act of communicating over the telephone with the victim, Jesse Hubbard. Hubbard, the apparent party on the other end was to be the murder victim and, therefore, silenced. Therefore, the verbal act of talking over the telephone with Hubbard was a privileged communication:

> We are of the opinion, however, that the Appellant's Acts in relation to the Appellee's lost money, done in the presence of the witness Henrietta, during the marriage and in response to her questions or sug-

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gestions, were 'confidential communications' to her by her husband, the Appellant, within the meaning of the Statute. It was not necessary that the Appellant's communication to his wife, the witness, in relation to the money, should be expressed in words. Their interview was private and confidential; and the actions of the Appellant, in the presence of his wife, in relation to Appellee's lost money, were such a communication by him to her that she was not a competent witness, under the Statute, to testify in regard to his actions, without his consent. The Court erred we think, in permitting the witness Henrietta Perry to testify on the trial to the Appellant's acts, in her presence and during the marriage, in relation to the money in controversy; and for this error of law, assigned the cause for a new trial, the Appellant's motion therefore ought to have been sustained. Perry v Randall, (1882) 83 Ind. 143, 147.

It appears to be settled in this State, and generally in the United States, that privileged communications between husband and wife are not confined to mere audible communications to one another, but include knowledge communicated by an act, which would not have been done by one spouse in the presence or within the sight of the other, but for the confidence between them by reason of the marital relation. Smith v State, (1926), 152 N.E. 803, 805.

In the case at hand, the Trial Judge admitted the testimony of the husband upon the premise that the driving of an automobile could not constitute the communication of information. As previously shown, it is not merely written or verbal communications that are privileged as between husband and wife, but the imparting of information, however conveyed, when done in reliance upon the inviolate nature of marital relationship. Clearly participation in the crime was a matter of confidence between the defendant and the witness. Shephard v State, (1971) ___ Ind. ___, 277 N.E. 2d 165, 168.

Therefore, since the Defendant was relying upon the confidence of the marital relationship, his communication with the person who was to be killed, is a verbal act which is protected by case law in Indiana. The admission of said testimony over the objection of the Defendant was error and, therefore, this matter should be reversed and retried.

IV

The Court committed an error of law in sentencing Defendant as an habitual criminal when the Defendant had already been so convicted and sentenced in the Fulton Circuit Court.

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As early as 1895, the United States Supreme Court held that Habitual Offender Statutes do not impose double jeopardy against a criminal defendant. Moore v Missouri, ___ U.S. ___, 40 L. Ed. 301 (1895). Indiana is not, nor has it ever been, an exception to the rule. Wise v State, ___ Ind.___, 400 N.E. 2d 114 (1980). See also, 39 Am. Jur. 2d Habitual Criminals 307; 79 ALR 2d 826; 139 ALR 673; 132 ALR 91; 116 ALR 202; 82 ALR 345.

However, the case at bar presents a unique problem. The defendant was sentenced to an additional thirty (30) years as an habitual offender in Fulton Circuit Court. The two (2) prior felonies used as the basis of the enhanced sentence in the Fulton Circuit Court are the same two (2) prior felonies used in the case at bar. Thus, the defendant's sentence is being enhanced in Fulton Circuit Court and LaPorte Circuit Court by the very same prior felonies. The effect is that the defendant is being sentenced twice as an habitual offender based upon the same prior felonies.

The objections to this procedure are two fold. First, to impose two habitual offender sentences based upon the same prior felonies is to contradict the Indiana Court's previous analysis of the issue and, therefore, bring the punishment within the purview and prohibition of double jeopardy. Secondly, to impose two consecutive habitual offender sentences based upon the same prior felonies violates the legislative intent of the Statute and, therefore, the second sentence should be vacated on policy grounds.

A.

The Indiana Habitual Offender sentencing scheme is a penal provision. Ind. Code 35-50-2-8 (1979). A statute of this nature should be strictly construed. Its provisions should not be extended by construction. . . ." Metzger v State, ___ Ind. ___, 13 N.E. 2d 519, 521 (1938).

Absent express provisions to the contrary, the terms of the Habitual Offender Act must be applied as it is written. The

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Act is written in the singular; that is, the Act makes no provision that an individual could be sentenced more than once as an Habitual Offender. Moreover, the Act makes no provision that the two prior felony convictions can be used more than once to support an adjudication as an habitual offender. In otherwords, the Act is silent as to whether the two prior felony convictions necessary to support and enhance sentence as an initial habitual offender can later be used to support a separate, consecutive sentence as an habitual offender in an unrelated case. The defendant's position is that under the rules of strict construction, the prior felonies needed to support a finding of habitual offender can only be used once.

This is an issue of first impression in Indiana. Consequently, guidance must be sought elsewhere. Texas has experienced the problem presented in the case at bar, perhaps more often than any other state. In its resolution of the issue the Texas courts have resolved the only just rule: prior convictions cannot be used more than once to enhance punishment.

In Kinney v State, 79 S.W. 570 (Tex. Crim. App. ____), the trial court gave the defendant an enhanced sentence because of a prior felony conviction. However, the same prior felony had already been used to enhance a previous felony. In striking down the enhanced sentence the Court stated:

> [I]t was never intended that prior offenses could thus be made to do double duty; that is, that prior could be used to enhance the punishment in any given case more than once. To give the statute such an effect would be vilative of the principles of former jeopardy, which inhibits a defendant from being convicted more than once for the same offense. The only difference is that here the same offense was used more than once in order to enhance his punishment . . . So it would follow that the judgment in this case cannot be sustained, because the same cases on which the enhanced punishment is predicated here had previously been exhausted.

Id. at 571. Similarly, in Ex Parte White, 538 S.W. 2d 417 (Texas Crim. App. (1976), the Texas court held:

> It has long been the rule in this State that prior convictions cannot be used more than once to enhance punishment. (citations omitted) . . . We therefore

> hold that the State was barred from using the same prior convictions for second offender enhancement under the provisions [of the Statute] where said prior convictions had been previously used successfully . . . .

Id. at 410. And in Rollins v State, 542 S.W. 2d 163 (Tx. Crim. Ap 1976):

> There is another matter we must review . . . in the interest of justice. Both convictions here obtained were enhanced by the same prior felony conviction. It [has been] held that the same prior felony convictions could not be used to twice enhance punishment under the provisions [of the statute.]

Id. at 164.

Thus, absent express statutory provisions to the contrary the Texas Rule is clearly the only correct rule under the principle of strict construction: It is improper to use the same prior felon to enhance punishment with respect to each of two subsequent offens

B.

The intent of the Legislature in enacting the Habitual Offender Act was to punish greater those three time recidivists who did not learn their lesson the first time through the criminal justice system. See Commentary, Ind. Code 35-50-2-8 (1979), Wests Annotated Statutes. It must be presumed that the Legislature's intent still prevails with the Habitual Offender Act. In otherword if a recidivists received an enhanced sentence under the Habitual Offender Act, he must have his chance to rehabilitate himself under the enhanced sentence before he can again be adjudicated as an habitual offender and again sentenced to an enhanced prison term.

Such a rule necessarily puts full force of effect into the legislative intent of the Habitual Offender Act.

CONCLUSION

The Indiana Habitual Offender Act must be strictly construed. "Its provisions should not be extended by construction . . . ." Metzger v State. ___ Ind. ___, 13 N.E. 2d 519, 521 (1938).

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Once the State successfully uses two prior felony convictions to enhance a defendant's sentence, those two prior felony convictions are no longer available to the State to be used again as the basis of a subsequent adjudication as an Habitual Offender. "So it would follow that the judgment in this case cannot be sustained, because the same cases on which the enhanced punishment is predicated here had previously been exhausted." Kinney v State, 79 S.W. 570, 571 (Tx. Crim. App. ____).

V

THE COURT COMMITTED AN ERROR OF LAW BY ALLOWING THE STATE OF INDIANA TO AMEND THE REQUEST FOR THE DEATH PENALTY.

First, there is an obvious irregularity in the Amended Indictment. The Indictment begins by stating that: "The Grand Jurors of Marshall County . . . ." The Indictment in this matter was returned by the Grand Jury in January of 1980. The Amended Indictment was filed in June of 1980. Obviously, by the fact that the Deputy Prosecuting Attorney, Ralph Huff's name is affixed to the Amended Indictment, the Grand Jurors did not so amend the request for the death penalty. Instead, it was amended by the State of Indiana, itself, without going through the Grand Jury procedure. While this is proper, nevertheless, to state that the Grand Jurors filed this Amended death penalty is to misstate facts to the substantial prejudice of the defendant.

Further, the Amended Indictment for the death penalty should have been dismissed because it does prejudice the substantial rights of the Defendant in accordance with 35-3.1-1-5 (d):

> Before amendment of any indictment or any information other than amendment as provided in Subsection B of this section, the Court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the Court shall, upon motion by the defendant, order any adjournment or postponement of the proceedings, which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense.

Further, Sub-section E provides:

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> Notwithstanding any other provision in this section, an indictment or information shall not be amended in any respect which changes the theory or theories of the prosecution as originally stated, or changes the identity of the defense charged . . . .

The amendment in this case was entered and granted ex parte. The defendant should be given an opportunity to be heard. Further, the amendment should not be granted because it changes the theory upon which the death penalty should be granted, and to that extent also changes the identity of the defense charged in that it increases the likelihood of the imposition of the death penalty.

MORRISON AND HUMPHREY

By _____
Jere L. Humphrey

_____
E. Nelson Chipman, Jr.
Legal Intern
Valparaiso University

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing Motion to Correct Errors and Supporting Memorandum was personally delivered to Ralph Huff, Deputy Prosecuting Attorney, at his office at 550 East Jefferson Street, Plymouth, Indiana, 46563, this _____ day of _____, 1980.

_____
Jere L. Humphrey

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STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT

1980 TERM

STATE OF INDIANA,)
Plaintiff)
vs.)
LARRY WILLIAMS,)
Defendant)

Cause No. 4807-C

ORDER

The above entitled cause of action having come on for hearing before this court on the 20th day of November, 1980, on the defendant's motion to correct errors; and the parties hereto having been represented by counsel and argument having been submitted to the court; and said matter having been taken under advisement; the court, now having considered the law in relation thereto and being duly advised and fully satisfied in the premises, now finds that said motion should be denied.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED by the court that defendant's motion to correct errors be, and the same is, hereby denied.

DATED this 25th day of November, 1980.

Ralph R. Huff
Judge of the La Porte Circuit Court

cc: Ralph R. Huff
Jere L. Humphrey

FILED
IN OPEN COURT
NOV 25 1980
CLERK OF LA PORTE CIRCUIT COURT

FILED
MAY 27 1981
CLERK OF THE INDIANA SUPREME AND COURT OF APPEALS

IN THE

SUPREME COURT OF INDIANA

LARRY WILLIAMS,

Appellant (Defendant below),

v.

No. 1280 S 443

STATE OF INDIANA,

Appellee (Plaintiff below).

ORDER

Comes now the Supreme Court of Indiana and finds that the Record of Proceedings in the above-captioned matter does not contain the specific written findings which are required to be made in all death penalty cases pursuant to Ind. Code § 35-50-2-9 (Burns 1979 Repl.).

Accordingly, this Court is hereby remanding this case to the trial court and The Honorable Robert S. Gettinger, Judge. It is hereby ordered that Judge Gettinger make the required specific written findings in this case, setting out the specific aggravating circumstances, the mitigating circumstances, if any, and the reasons for the imposition of the death penalty. Brewer v. State, (1981) ___ Ind. ___, 417 N.E. 2d 889, n. 3. Said findings shall be made nunc pro tunc effective the date of the sentencing hearing. Thereafter, the above findings shall be filed with the Clerk of the trial court and certified by the trial court Clerk and transmitted to the Clerk of this Court for filing. All of the above shall be accomplished on or before the 22nd day of June, 1981.

The Clerk of this Court is directed to serve a copy of this Order to Judge Gettinger, and to the Clerk of LaPorte Circuit Court, LaPorte, Indiana, and to all parties of record.

DONE at Indianapolis, Indiana, this 27 day of May, 1981.

Richard M. Givan,
Chief Justice of Indiana

STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT

1981 TERM

FILED
IN OPEN COURT
JUN - 1 1981
Annabelle S Link
CLERK OF LA PORTE CIRCUIT COURT

STATE OF INDIANA,
Plaintiff

vs.

LARRY WILLIAMS,
Defendant

Cause No. 4807-C

NUNC PRO TUNC ORDER

In accordance with the order of the Supreme Court of Indiana dated the 27th day of May, 1981, under Cause No. 1280-S-443, the court now sets forth in writing its specific findings upon which the sentence of death was based as follows:

(1) The defendant, Larry Williams, and the co-defendant, Larry Perkins, drove to the decedent's residence with a calculated plan to get some money from the decedent.

(2) The co-defendant, Larry Perkins, had in his possession a 22-caliber revolver prior to entering the decedent's residence; but during the course of the killing the defendant gained possession of the weapon.

(3) The co-defendant, Larry Perkins, dropped the defendant off at the decedent's residence and, while the defendant was inside the house, he smoked marijuana while the decedent was lying on the couch.

(4) There came a time when the co-defendant, Larry Perkins, was admitted into the decedent's residence by the defendant, Larry Williams, and eventually they planned to and did knock the decedent out while he was lying on the couch.

(5) The co-defendant, Larry Perkins, struck the first blow to the side of the decedent's face, which knocked him off the couch and onto the floor; and then the defendant, Larry Williams, went to the kitchen and returned with a knife, stabbed the decedent with the knife on several occasions while he was lying on the floor, and then attempted to slit the decedent's throat.

(6) The defendant then secured a pipe and, when the decedent would start to move or attempt to get up from the floor, the defendant would strike the decedent with the pipe and he would fall back to the floor.

(7) The defendant also grabbed a whiskey bottle and, while the decedent was lying on the floor, proceeded to hit the decedent on the head with the whiskey bottle.

(8) While the defendant was engaged in this activity, he continued to shout at the co-defendant, Larry Perkins, to shoot the decedent.

(9) The circumstances became such that the co-defendant could not stand the sight of this brutal attack and went into the bathroom.

(10) During the stabbing by the defendant, he took the decedent's wallet out of his back pocket and there was an amount of money in the wallet which the defendant removed and part of which he gave to the co-defendant, Larry Perkins.

(11) The defendant was convicted of another murder in the Fulton Circuit Court on May 9, 1980.

The only possible mitigating circumstance which the court has given any thought to is the fact that the defendant was smoking marijuana and drinking beer while at the decedent's residence prior to committing the crime. This carried no weight with the court, however, since the scheme had been devised by the defendant and co-defendant to rob the decedent prior to starting out on this adventure.

The reason for the imposition of the death penalty is that the court feels that any lesser sentence would depreciate the seriousness of the crime; and the court feels that the jury has expressed, on behalf of our society, a moral concern about crimes committed in our society which we consider to be atrocious crimes, and that this was a crime so heinous that the court feels that the jury expressed the belief that the only appropriate response for our society to make to such a crime is "to fight fire with fire."

IT IS THEREFORE ORDERED AND ADJUDGED by the court that this entry be made as of the 29th day of August, 1980, nunc pro tunc.

DATED this 1st day of June, 1981.

Judge of the La Porte Circuit Court

cc: Ralph R. Huff
Jere L. Humphrey
Marjorie H. O'Laughlin (certified copy)

ATTORNEY FOR APPELLANT	ATTORNEYS FOR APPELLEE
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IN THE

SUPREME COURT OF INDIANA

LARRY WILLIAMS,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

No. 1280 S 443

APPEAL FROM THE LAPORTE CIRCUIT COURT

THE HONORABLE ROBERT S. GETTINGER, JUDGE

HUNTER, J.

The defendant, Larry Williams, was convicted by a jury of murder, Ind. Code § 35-42-1-1(1) (Burns 1979 Repl.), felony murder, Ind. Code § 35-42-1-1(2) (Burns 1979 Repl.), armed robbery, a class A felony, Ind. Code § 35-42-5-1 (Burns 1979 Repl.), conspiracy to commit armed robbery, a class A felony, Ind. Code § 35-41-5-2 (Burns 1979 Repl.), and habitual offender, Ind. Code § 35-50-2-8 (Burns 1979 Repl.). The jury recommended a sentence of death for the murder count, Ind. Code § 35-50-2-9 (Burns 1979 Repl.), and defendant was thereafter sentenced to death, ninety years, thirty years, thirty years, and thirty years respectively.

His direct appeal challenges the legality of the death sentence and presents the following issues:

1. Whether our death sentence statute violates any of several constitutional proscriptions of either the United States Constitution or the Indiana Constitution or was unconstitutionally applied in this case;

2. Whether the trial court erred in sentencing defendant as an habitual offender where this charge was based upon the same two underlying felonies as were used in a prior habitual offender conviction;

3. Whether the trial court erred in permitting defendant's wife to testify over a claim of privilege;

4. Whether the trial court erred in allowing the state to amend the death penalty request after the case had been filed; and

5. Whether the trial court erred in sentencing defendant on both the felony murder and armed robbery counts when the armed robbery was the felony involved in the felony murder.

A summary of the facts from the record shows that on April 13, 1979, the victim, Jesse Hubbard, failed to report for work at his place of employment in Plymouth, Indiana. One of Hubbard's co-workers, Richard Birchmeier, became concerned about Hubbard's uncharacteristic absence and went to Hubbard's house. He noticed that the front door was slightly ajar and then saw Hubbard lying on the floor with blood on his head. Birchmeier immediately called the police. Testimony at the trial established that Hubbard had died from a stab wound to the heart. There was also a basal skull fracture which would have been a fatal wound apart from the stab wound.

A witness for the state, Larry Perkins, testified that he had entered into a plea bargain with the state involving three murders, including the Hubbard murder, in exchange for his testimony. He stated that on the evening of April 12, 1979, he and defendant had agreed to blackmail Hubbard and went to his house for that purpose. Perkins testified that another friend, George Redman, was in on the plan and agreed to be an alibi witness for Perkins. At Hubbard's house, defendant, Perkins and Hubbard watched TV, drank beer and smoked pot for

awhile. Then Perkins and defendant decided they should rob Hubbard, so Perkins hit Hubbard on the head with his pistol. Defendant stabbed Hubbard several times with a butcher knife, then hit him with a whiskey bottle and with a piece of pipe. Finally, Perkins and defendant tried to wipe off their fingerprints. They took Hubbard's billfold, the beer and the pot and went to defendant's mother's house to split the money.

I.

(A) The defendant presents several arguments to the effect that our death penalty statute, Ind. Code § 35-50-2-9 (Burns 1979 Repl.) is unconstitutional. We have clearly held that this statute is not unconstitutional per se, as being in derogation of either the Eighth Amendment to the Constitution of the United States or Article 1, Sec. 16 of the Constitution of Indiana. Brewer v. State, (1981) ___ Ind. ___, 417 N.E. 2d 889; Judy v. State, (1981) ___ Ind. ___, 416 N.E. 2d 95. We have found that the death penalty may be imposed if the circumstances of the offense and the character of the offender both warrant. The procedural scheme set out in our statute limits the imposition of death sentences so as to insure that they will not be inflicted arbitrarily or capriciously. Brewer v. State, supra. This is in accord with the decisions and opinions of the United States Supreme Court. Gregg v. Georgia, (1976) 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859; Proffitt v. Florida, (1976) 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913; Jurek v. Texas, (1976) 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929.

We have previously compared our statutory and procedural requirements under the death penalty statute with those found in the Florida and Georgia statutes which were upheld by the United States Supreme Court. We found that our present statute is very similar to the Florida statute and that our death sentencing procedures are consistent with and in full compliance with the requirements set forth by the Supreme Court in Proffitt v. Florida, supra, and Gregg v. Georgia, supra. Thus, our statute is not violative of the Eighth and Fourteenth Amendments to the United States Constitution. Brewer v. State, supra.

Defendant therefore focuses his constitutional attack in this case upon what he terms the uncontrolled discretion given to the prosecuting attorneys under our statute to determine who will or who will not be charged with the death penalty. He first contends that this uncontrolled discretion results in an arbitrary and capricious selection of those against whom a death penalty is charged and therefore is unconstitutional. We find no constitutional problems in this area. Prosecutors are traditionally given a wide discretionary power in our criminal justice system to select the persons who are to be prosecuted at any level and to plea bargain with them. This frequently results in less than maximum sentences for specific individuals. The United States Supreme Court has clearly stated that "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Gregg v. Georgia, supra, 428 U.S. at 199, 96 S. Ct. at 2937, 49 L. Ed. 2d at 889. Similarly, we find nothing in the Constitution which prohibits prosecutorial discretion in charging the death penalty. Our statute has numerous provisions that protect each individual defendant from receiving an arbitrary or capricious sentence of death. The constitutional rights of our citizens are thus adequately protected.

Defendant further argues that the power to use the threat of the charge of the death penalty in the plea bargaining process is an unconstitutional burden upon his right to a jury trial under the Sixth and Fourteenth Amendments and upon his right against compelled self-incrimination under the Fifth and Fourteenth Amendments. He relies upon the rationale of United States v. Jackson, (1968) 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138, where the Court held that the death sentence provided by the Federal Kidnapping Act was unconstitutional because under the provisions of the Act only those insisting upon a jury trial faced the possibility of a death penalty whereas those tried to the court after waiving a jury trial and those pleading guilty faced only a sentence of life imprisonment.

We find that no such impermissible burden is present under our statutory scheme since the death sentence may be imposed after a guilty plea or a waiver of jury trial as well as after a plea of not guilty followed by a jury trial. Ind. Code § 35-50-2-9 (Burns 1979 Repl.) provides in part:

> "(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing."

Furthermore, the United States Supreme Court has specifically held that there is no per se rule against encouraging guilty pleas and and that a state may encourage a guilty plea by offering substantial benefits in return for the plea. Corbitt v. New Jersey, (1978) 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466. The Court has recognized the benefits of efficiency and speedy dispositions that plea bargaining offers, and has fully approved its use as long as it is accompanied by safeguards that insure full knowledge on the part of the defendant offering a guilty plea as to his rights, his consequent waiver of those rights, the crime to which he is pleading guilty and the maximum penalty or the extent to which he places himself at risk. Bordenkircher v. Hayes, (1978) 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604.

In Brady v. United States, (1970) 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463, the Court ruled that a guilty plea is not "coerced" merely because a defendant escapes the possibility of a death sentence by pleading guilty. In so holding the court said:

> "But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.
>
> "A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far." 397 U.S. at 753, 90 S. Ct. at 1471, 25 L. Ed. 2d at 759.

We find that no impermissible constitutional burden is placed on defendant's rights under our death penalty statute.

Defendant further argues that he was in fact penalized for the assertion of his rights since he received the death penalty but his two accomplices who entered guilty pleas received sentences of only 34 years and 54 years. We disagree. There is no evidence here that defendant was subjected to unwarranted charges. There was no constitutional impropriety in extending leniency to the accomplices in exchange for guilty pleas and denying that leniency to defendant. As the United States Supreme Court has said in Corbitt v. New Jersey, supra:

> "The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas." 439 U.S. at 223, 99 S. Ct. at 499, 58 L. Ed. 2d at 477.

As discussed above, a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return. Both this Court and the Federal Courts have recognized the state's legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining which is mutually beneficial to both a defendant and the state. Bordenkircher v. Hayes, supra; Norris v. State, (1979) ___ Ind. ___, 394 N.E. 2d. 144; McMahan v. State, (1978) 269 Ind. 566, 382 N.E. 2d 154. We find no constitutional error due to the use of the death penalty statute in the plea bargaining process.

Defendant next argues that the death penalty statute does not provide for meaningful appellate review of death penalty cases. Although he bases this contention on several grounds, we find no merit to this argument. First, defendant argues that there is no meaningful appellate review since this Court does not review those cases in which the death penalty was not charged. Here, we need only note that our Constitutions, statutes and regulations do protect those who are charged with the death penalty so as to prevent any arbitrary or capricious imposition of this ultimate penalty. Our constitutional scheme seeks to protect those individuals who are charged with a crime and insures review on an in-

dividual basis, but it does not impose review on those decisions to grant specific individuals mercy when given at any level.

Next, defendant argues that our death penalty statute does not give specific guidance to the trial court and the jury as to how to weigh the aggravating and mitigating circumstances in determining the death penalty. As we found in Judy v. State, supra, the necessary standards and guidance are found by looking at our criminal statutes and procedural rules in their entirety. Indiana's general sentencing hearing statute requires, in all cases where there are aggravating circumstances present, that the sentencing judge include a written statement of the reasons for selecting the sentence he imposes. Ind. Code § 35-4.1-4-3 (Burns § 35-50-1A-3, 1979 Repl.). Our death penalty statute requires that the jury may recommend the death penalty only if it unanimously finds beyond a reasonable doubt that at least one of the enumerated aggravating circumstances does exist, and that the mitigating circumstances, if any, do not outweigh the aggravating circumstances. Ind. Code § 35-50-2-9(e) (Burns 1979 Repl.). The trial court, who then makes the final determination of the sentence to be imposed, must consider the jury's recommendation and must also base his decision on the same standards that the jury was required to consider. Id. Finally, every sentence of death is subject to automatic, expedited review by this Court. Ind. Code § 35-50-2-9(h) (Burns 1979 Repl.). This review is thorough and adequate since we have before us the entire record of the proceedings, including the complete record of the sentencing hearing and the trial court's written statement of the reasons for the sentence imposed. Brewer v. State, supra; Judy v. State, supra. This sentencing procedure gives clear and specific guidance to the sentencing authority and adequately protects each individual's constitutional rights.

Finally, defendant contends that there cannot be an adequate appellate review of his case by this Court since there are no specific guidelines in the statute to govern such review. We find that our rules do provide for an adequate and meaningful appellate review. Our rule for the appellate review of sentences states:

"Rule 2
"SCOPE OF REVIEW

"(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

"(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

This standard places the emphasis of review on the specific circumstances of each case and the nature of each individual defendant. Our review is facilitated by the written statement of the trial court's sentencing decision but also includes a thorough consideration of the facts presented by the entire record. The entire review procedure is adequate to assure that any decision to impose the death sentence is based upon reason and the specific offense and the character of the offender. The fact that defendant's two accomplices were given significantly less severe sentences as a result of plea bargains does not affect the reasonableness of defendant's own sentence. Defendant's sentence must be judged by the particular facts of his own case, not the facts accompanying his accomplices' cases.

Defendant next argues that since our death penalty statute gives the entire discretion to charge the death penalty to prosecuting attorneys, it improperly delegates the legislative authority of fixing the penalties for crimes to the executive branch of the government and also usurps the judicial function of imposing criminal penalties. There is no merit to this argument since the office of prosecuting attorney is a judicial office created by the Indiana Constitution, Art. 7, section 16. State ex rel. Latham v. Spencer Circuit Court, (1963) 244 Ind. 552, 194 N.E. 2d 606; State ex rel. Williams v. Ellis, (1916) 184 Ind. 307, 112 N.E. 98.

The duties of the prosecutor and the manner of commencing prosecution are set out by statute and thus are consistent throughout the entire state. Ind. Code § 33-14-1-3, § 33-14-1-4 (Burns 1975 Repl.) and Ind. Code § 35-3.1-1-1 (Burns 1979 Repl.). The prosecuting attorney's duties are concerned with representing the state of Indiana as an attorney at law and all criminal prosecutions are carried on in the name of the state of Indiana. Indiana Constitution, Article 7, Section 18, State

ex rel. Indiana State Bar Assn. v. Moritz, (1963) 244 Ind. 156, 191 N.E. 2d 21. The preservation of proper standards of conduct by attorneys and prosecuting attorneys is a subject for the courts, which are charged with the control of the judicial branch of government. State ex rel. Latham v. Spencer Circuit Court, supra. Thus, it is clear that any discretionary power that is vested in the prosecuting attorneys under the death penalty statute is exercised under the control of the courts of this state. Therefore, we find that the statute does not violate those sections of our Constitution prohibiting laws dependent upon authority other than provided by the Constitution, prohibiting the suspension of the operation of laws, or prohibiting the promulgation of local or special laws for the punishment of crimes. Indiana Constitution, Article 1, §§ 25, 26, Article 4, § 22.

Defendant's final specification of constitutional error is that the death penalty statute violates Article 1, Section 18 of the Indiana Constitution which requires our penal code to be founded on principles of reformation and not of vindictive justice. However, this provision has been consistently interpreted by this Court not to prohibit capital punishment. We have found that this section is an admonition to the legislative branch of the state government and is addressed to the public policy which the legislature must follow in formulating the penal code. It applies to the penal laws as a system to insure that these laws are framed upon the theory of reformation as well as the protection of society. Brewer v. State, supra; French v. State, (1977) 266 Ind. 276, 362 N.E. 2d 834; Denson v. State, (1975) 263 Ind. 315, 330 N.E. 2d 734; Adams v. State, (1971) 259 Ind. 64, 271 N.E. 2d 425; Kistler v. State, (1921) 190 Ind. 149, 129 N.E. 625. We find no constitutional infirmities in the death penalty statute.

(8) In reviewing the imposition of the death penalty in the instant case, we find that all of the statutory procedures were followed in the trial of this defendant. During the guilt determination phase of the proceedings, the jury found beyond a reasonable doubt that the

defendant intentionally killed the victim, robbed the victim and had conspired with another individual to commit this robbery. A separate sentencing hearing was held following the guilt determination. At this time, the state introduced evidence that defendant had been convicted of another murder in Fulton County, Indiana. The testimony presented in the first stage of the trial which showed that defendant had committed the instant murder while in perpetration of a felony was also incorporated by reference in this stage of the proceedings. The trial judge instructed the members of the jury as to their duties in determining whether to recommend the death penalty. They were fully instructed as to all the aggravating and mitigating circumstances they were to consider. Defendant was given an opportunity to present any evidence he wished at that time, but he presented no evidence. Both sides were offered an opportunity to argue to the jury concerning the question of the appropriateness of imposing the death penalty in this case. By a written, unanimous verdict, the jury returned a recommendation that defendant be sentenced to death.

The trial judge then considered all the evidence in the case, including the jury's recommendation and the aggravating and mitigating circumstances presented before he held a final sentencing hearing. The judge also considered the information in the presentence report filed by the probation officer, which showed the lengthy criminal history of the defendant even though he was only twenty-two years old. At the final sentencing hearing, both parties again had an opportunity to present evidence to the judge. The state presented no new evidence; defendant pointed out certain errors in the presentence report but presented no other evidence. The trial judge then sentenced defendant and made his findings in writing in the record stating therein his reasons for fixing the death penalty.[1/]

---

1. The trial court's written findings of fact were not included in the original transcript received by this Court. Pursuant to our order, the court has now sent to us his written findings of fact upon which the sentence of death was based and they are now part of the record. [Footnote continued on page 11.]

We have reviewed those findings and reasons along with the evidence in the case and find that the record clearly supports the conclusion that the imposition of the death sentence was determined by the nature of the offense and the character of the offender. Two of the statutory aggravating circumstances were clearly proved beyond a reasonable doubt. The only evidence of any possible mitigating circumstance was testimony that defendant was smoking marijuana and drinking beer with the victim prior to committing the crimes. The trial judge found this had no effect in outweighing the aggravating circumstances, however, since defendant had devised an intentional scheme of robbery and blackmail before going to the victim's house.

[Continuation of Footnote 1.]

> "In accordance with the order of the Supreme Court of Indiana dated the 27th day of May, 1981, under Cause No. 1280-S-443, the court now sets forth in writing its specific findings upon which the sentence of death was based as follows:
>
> "(1) The defendant, Larry Williams, and the co-defendant, Larry Perkins, drove to the decedent's residence with a calculated plan to get some money from the decedent.
>
> "(2) The co-defendant, Larry Perkins, had in his possession a 22-caliber revolver prior to entering the decedent's residence; but during the course of the killing the defendant gained possession of the weapon.
>
> "(3) The co-defendant, Larry Perkins, dropped the defendant off at the decedent's residence and, while the defendant was inside the house, he smoked marijuana while the decedent was lying on the couch.
>
> "(4) There came a time when the co-defendant, Larry Perkins, was admitted into the decedent's residence by the defendant, Larry Williams, and eventually they planned to and did knock the decedent out while he was lying on the couch.
>
> "(5) The co-defendant, Larry Perkins, struck the first blow to the side of the decedent's face, which knocked him off the couch and onto the floor; and then the defendant, Larry Williams, went to the kitchen and returned with a knife, stabbed the decedent with the knife on several occasions while he was lying on the floor, and then attempted to slit the decedent's throat.
>
> "(6) The defendant then secured a pipe and, when the decedent would start to move or attempt to get up from the floor, the defendant would strike the decedent with the pipe and he would fall back to the floor.
>
> "(7) The defendant also grabbed a whiskey bottle and, while the decedent was lying on the floor, proceeded to hit the decedent on the head with the whiskey bottle.

[Footnote continued on page 12.]

We find that the trial court in all respects properly followed the required procedures in imposing the sentence of death. There was ample evidence in the record to support the trial court's determination that two aggravating circumstances were proved beyond a reasonable doubt and that no mitigating circumstances existed which outweighed the aggravating circumstances. An examination of the entire record in this case clearly supports the conclusion that the imposition of the death penalty was determined by the nature of the offense and the character of the defendant. This consideration and our finding that the trial court carefully complied with the proper procedures supports our conclusion that the sentence of death recommended by the jury and imposed by the trial court was not arbitrarily or capriciously arrived at, and is not manifestly unreasonable.

[Continuation of Footnote 1.]

> "(8) While the defendant was engaged in this activity, he continued to shout at the co-defendant, Larry Perkins, to shoot the decedent.
>
> "(9) The circumstances became such that the co-defendant could not stand the sight of this brutal attack and went into the bathroom.
>
> "(10) During the stabbing by the defendant, he took the decedent's wallet out of his back pocket and there was an amount of money in the wallet which the defendant removed and part of which he gave to the co-defendant, Larry Perkins.
>
> "(11) The defendant was convicted of another murder in the Fulton Circuit Court on May 9, 1980.
>
> "The only possible mitigating circumstance which the court has given any thought to is the fact that the defendant was smoking marijuana and drinking beer while at the decedent's residence prior to committing the crime. This carried no weight with the court, however, since the scheme had been devised by the defendant and co-defendant to rob the decedent prior to starting out on this adventure.
>
> "The reason for the imposition of the death penalty is that the court feels that any lesser sentence would depreciate the seriousness of the crime; and the court feels that the jury has expressed, on behalf of our society, a moral concern about crimes committed in our society which we consider to be atrocious crimes, and that this was a crime so heinous that the court feels that the jury expressed the belief that the only appropriate response for our society to make to such a crime is 'to fight fire with fire.' "

Although the judge's final paragraph is phrased in moral, conclusionary terms rather than strict legal language, his entire statement does set out the specific details necessary to show that the aggravating and mitigating circumstances were carefully considered and that the sentence was not arbitrarily or capriciously imposed.

II.

Defendant next argues that it was error for the trial court to sentence him under the habitual offender count since he had previously been sentenced as an habitual offender at a prior trial on an unrelated murder wherein the state alleged and proved the same two underlying felonies as were used in the instant trial. This issue has clearly been decided adversely to defendant in Baker v. State, (1981) ___ Ind. ___, 425 N.E. 2d 98.

We have consistently emphasized the unique status of the habitual offender statute. This statute has historically provided for greater punishment than would ordinarily be imposed upon the substantive crime charged. The purpose of the statute is to more severely penalize those persons whom prior sanctions have failed to deter from committing felonies. Comstock v. State, (1980) ___ Ind. ___, 406 N.E. 2d 1164; Hall v. State, (1980) ___ Ind. ___, 405 N.E. 2d 530; Wise v. State, (1980) ___ Ind. ___, 400 N.E. 2d 114; Norris v. State, (1980) ___ Ind. ___, 394 N.E. 2d 144. Since the additional punishment is imposed for each new crime and not for crimes for which the defendant has already been convicted and punished, prior convictions used to establish the fact of habitual criminality at one trial can be used again after a subsequent felony conviction. Baker v. State, supra; Hall v. State, supra. There was no error in sentencing defendant on the habitual offender count.

III.

Defendant next contends that certain testimony of his wife was erroneously admitted over an objection that it was a privileged communication between husband and wife. At trial, Sherri Williams, defendant's wife, was called as a witness by the state and gave the following testimony about a telephone call defendant received from Hubbard on the afternoon of April 12, 1979:

Q. [Prosecutor] "Did Larry initiate this phone conversation or did someone call him?"

A. [Sherri Williams] "Someone called him."

Q. "And did he, in fact, talk to this person on the phone?"

A. "Yes, he did."

Q. "And what did he say to that person on the phone?"

MR. HUMPHREY: "I'll object to the privilege."

COURT: "Objection overruled, you may answer."

Q. "What did he say to that person on the phone?"

A. "Ah, I didn't hear the whole conversation. All that I heard was that him and Larry Perkins would be over later."

The trial court correctly admitted this testimony as the conversation was with a third person and was not a privileged communication between husband and wife which would be protected under Ind. Code § 34-1-14-5(6) (Burns 1973 Repl.).

Privileged communications between husband and wife have been restricted in application to confidential communications and information gained by reason of the marital relationship. Teague v. State, (1978) 269 Ind. 103, 379 N.E. 2d 418; Resnover v. State, (1978) 267 Ind. 597, 372 N.E. 2d 457. Here, the telephone call was initiated by the victim, Hubbard. The communication was intended for Hubbard and was not a confidential communication between husband and wife.

IV.

Defendant next contends that it was error for the trial court to allow the state to amend the indictment for the death penalty approximately one month prior to the trial. The original request for the death penalty, filed on January 30, 1980, listed the killing while in the course of armed robbery as the aggravating circumstance necessary to support the imposition of the death penalty. Subsequently, on June 6, 1980, an amended information was filed alleging the additional aggravating circumstance of a prior murder conviction. The conviction date for this unrelated murder was May 9, 1980.

It is well settled that a prosecutor may amend an indictment or information at any time, as long as the defendant is accorded an adequate opportunity to prepare his defense commensurate with such changes. Ind. Code § 35-3.1-1-5 (Burns 1975 Repl.); Gilmore v. State, (1981) ___ Ind. ___, 415 N.E. 2d 70; Highsaw v. State, (1978) 269 Ind. 458, 381 N.E. 2d 470. In this case, defendant has not shown that the addition of the second aggravating circumstance resulted in any prejudice to his substantial rights. There was no substantial change to the state's theory of the case and defendant did have an adequate opportunity to prepare his defense to this additional allegation. The trial court did not err in permitting the indictment to be amended.

V.

Defendant finally contends that it was error for the trial court to sentence him for both the felony murder and the armed robbery since the felony murder arose from a killing in the commission of the armed robbery. This contention is correct, but we also find another related error in the sentencing which we must review as fundamental error. In this case the charged offenses of murder and felony murder arose out of the homicide of one individual. Therefore, the trial court could not impose a sentence on both counts of murder. Pointon v. State, (1980) ___ Ind. ___, 408 N.E. 2d 1255; Yates v. State, (1978) 267 Ind. 604, 372 N.E. 2d 461; Holland v. State, (1976) 265 Ind. 216, 352 N.E. 2d 752. We remand this cause with instructions to vacate the sentence on the felony murder charge.[2/] Since the sentence on the felony murder charge must be vacated, the sentence on the armed robbery charge is correct.

---

2. We note that the sentence of ninety years which was imposed upon the felony murder charge is not a valid sentence under our present statute. Ind. Code § 35-50-2-3 (Burns 1979 Repl.). If this sentence were not vacated, the trial court would be instructed to correct the sentence to conform with the statute.

We find no reversible error with respect to the guilt determination or the death sentence determination. The findings and reasons of the trial court are a part of the record. We have reviewed the evidence in detail and find that there is a rational basis under the provisions of Ind. Code § 35-50-2-9 (Burns 1979 Repl.) for the sentence imposed. The sentence is not manifestly unreasonable in light of the offense and the character of the offender.

This cause is remanded to the trial court with instructions to vacate the sentence on the felony murder charge. The judgment of the trial court is otherwise in all things affirmed. The cause is further remanded to the trial court for the purpose of fixing a date for the death sentence to be carried out.

GIVAN, C.J., AND PIVARNIK, J., CONCUR.

DeBRULER, J., CONCURS AND DISSENTS WITH OPINION IN WHICH PRENTICE, J., CONCURS.

IN THE

SUPREME COURT OF INDIANA

LARRY WILLIAMS, Appellant,	)	
v.	)	NO. 1280 S 443
STATE OF INDIANA, Appellee.	)	

APPEAL FROM LA PORTE CIRCUIT COURT
Honorable Robert S. Gettinger, Judge

DeBRULER, J. - Concurring and Dissenting

The mandatory death penalty for murder has been rejected as violative of the Eighth Amendment. In Woodson v. North Carolina, (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, it was held that:

> "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S., at 100, 78 S.Ct. at 597 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304; 96 S.Ct. at 2991.

Under our death sentencing statute the constitutional mandate that the character and record of the individual offender be considered by the sentencing judge is to be carried out in the search for and evaluation of mitigating circumstances. Indiana Code § 35-50-2-9(c) governing this part of the sentencing process states:

> "(c) The mitigating circumstances that may be considered under this section are as follows:
>
> (1) The defendant has no significant history of prior criminal conduct.
>
> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
>
> (3) The victim was a participant in, or consented to, the defendant's conduct.
>
> (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
>
> (5) The defendant acted under the substantial domination of another person.
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substan-

tially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration."

This part of the sentencing statute must be construed to encompass the constitutional mandate that the character and record of the individual offender be considered, and it must be emphasized and repeated that this part of the process does not involve a search for an excuse or justification for criminal conduct, but for knowledge of the person to the end that a judgment be made upon the question of whether the offender is the sort of person who should be put to death rather than put in jail.

The judge's order before us, and quoted in full in the majority opinion, falls short of satisfying this constitutional mandate and the mandate of this Court in Judy v. State, (1980) Ind., 416 N.E.2d 95, that an express written and independent analysis of the defendant's character and record be made. That part of the order which reflects the judge's efforts in satisfaction of this mandate is as follows:

> "The only possible mitigating circumstance which the court has given any thought to is the fact that the defendant was smoking marijuana and drinking beer while at the decedent's residence prior to committing the crime. This carried no weight with the court, however, since the scheme had been devised by the defendant and co-defendant to rob the decedent prior to starting out on this adventure.
>
> The reason for the imposition of the death penalty is that the court feels that any lesser sentence would depreciate the seriousness of the crime; and the court feels that the jury has expressed, on behalf of our society, a moral concern about crimes committed in our society which we consider to be atrocious crimes, and that this was a crime so heinous that the court feels that the jury expressed the belief that the only appropriate response for our society to make to such a crime is 'to fight fire with fire.' "

There is little or no consideration given in this writing to appellant's character and record. To illustrate its incompleteness in this regard, one need only compare this order with the one considered and quoted in full in Brewer v. State, (1981) Ind., 417 N.E.2d 889, written by Judge Clement of the Lake Superior Court, Criminal division which utilizes several pages in disclosing the court's consideration of the defendant's background. Further evidence of the incompleteness is to be gleaned from the pre-sentence report which

reveals the following and more about appellant:

1. He was twenty-one years old at the time of the killing.

2. Stealing has been his way of life since he was ten years old.

3. Using and selling contraband drugs has been his way of life since he dropped out of high school as a freshman.

4. His younger brothers are in trouble with the law.

5. He, his mother, and seven brothers and sister were abandoned by the father when appellant was eleven years old. They became destitute and lived in squalor on welfare payments.

6. Prior to abandoning the family entirely, his father would leave the family without explanation for several weeks at a time.

A life history of this sort does not necessitate the rejection of the penalty of death. But it does provide information which cannot constitutionally be ignored in giving due regard to the offender's character, record, and amenability to rehabilitation. It is a mitigating circumstance, for the purpose of deciding between death and imprisonment, that the offender began to demonstrate the capacity to form serious criminal intent at the age of ten or eleven. The ten- or eleven-year-old who develops such a pattern of behavior, does so through the influence of others upon whom he is dependent or because of emotional disturbance, and without making the kind of choice warranting the severest moral condemnation.

Finally, I read the court's final paragraph in the order, above, to apply a standard not applicable in making the choice of death, i.e., that "any lesser sentence would depreciate the seriousness of the crime"; and to report that his own feelings comport with those of the jurors, i.e., that the penalty of death is required here in order for society "to fight fire with fire". This part of the court's order is central to his decision, as he repeated in his second order following remand by this Court. It is no more nor less than an application of lex talionis, forbidden by the policy of the law in the sentencing statute, and contrary to the requirement of Art. I, § 18, of the Indiana Constitution that "The penal code shall be founded on the principles of reformation, and not of vindictive justice." Judy v. State, supra (Debruler, J., dissenting). See also Kanter, Dealing with Death, The Constitutionality of Capital

Punishment in Oregon, 16 Willamette L. Rev. 1 (Winter, 1979). It reflects the unconstitutional purpose to secure retribution and vengeance for appellant's crime.

As the record fails to disclose that the judgment of the court to impose the death penalty was arrived at after giving due regard to the offender's character, record, and amenability to rehabilitation, and as the record does disclose that the judgment was arrived at upon consideration of impermissible matter, I would not permit such judgment to stand.

This case should be remanded to the trial court to impose a determinate sentence on the murder count.

Prentice, J., concurs.

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 3-1280S443

Leroy Willis vs. State of Indiana

You are hereby notified that the Supreme Court

has on this day Appellants petition for Rehearing denied without Opinion. DeBruler, A.C.J. DeBruler and Prentice, JJ., vote to Grant Rehearing.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 26th day of May 19 83

Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

d-1

STATE OF INDIANA)
) SS:
COUNTY OF LA PORTE)

IN THE LA PORTE CIRCUIT COURT
1982 TERM

FILED
IN OPEN COURT
APR - 1 1982
CLERK OF LA PORTE CIRCUIT COURT

STATE OF INDIANA,
Plaintiff
vs.
LARRY WILLIAMS,
Defendant

Cause No. 4807-C

AMENDED ORDER

The court, on its own motion, now amends its order entered in the above entitled cause of action on the 29th day of March, 1982, in that the order of the Supreme Court of Indiana certified to the La Porte Circuit Court on the 26th day of March, 1982, under Cause No. 1280-S-443, ordered this court to vacate the sentence imposed on the felony murder charge, as well as to impose a determinate sentence on the murder count.

The court finds that the sentenced imposed upon the verdict entered on the felony murder charge should be vacated; and that the defendant, Larry Williams should be committed to the custody of the Indiana Department of Corrections in a maximum security facility for the offense of murder and that he should be sentenced to death, such execution to be before sunrise on the 20th day of July, 1982.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED by the court as follows:

(1) That the sentence heretofore entered in this cause of action on the 25th day of August, 1980, on the verdict of felony murder be, and the same is, hereby set aside and the same is held for naught; and

(2) That the defendant, Larry Williams, be, and he is, hereby committed to the custody of the Indiana Department of Corrections in a maximun security facility; and that said defendant be, and he is,

hereby sentenced to death, and such execution is hereby ordered before sunrise on the 20th day of July, 1982.

DATED this 1st day of April, 1982.

Judge of the La Porte Circuit Court

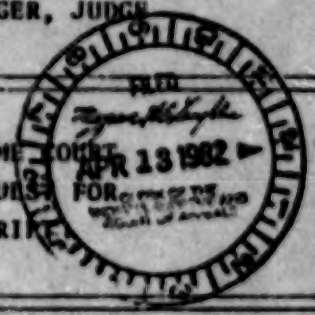
cc: David R. Holmes
Jere L. Humphrey
Palmer K. Ward, DAG
Indiana State Prison
Clerk of the La Porte Circuit Court

IN THE

SUPREME COURT OF INDIANA

1280 S 443

LARRY WILLIAMS, Appellant (Defendant Below)	APPEAL FROM THE LA PORTE CIRCUIT COURT
V.	
STATE OF INDIANA, Appellee (Plaintiff Below)	THE HONORABLE ROBERT S. GETTINGER, JUDGE



NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND REQUEST FOR CERTIFICATION OF TRANSCRIPT

Comes now Jere L. Humphrey, Counsel for Appellant, and states:

I.

1. Notice is hereby given that Larry Williams, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Indiana Supreme Court overruling the Appellant's petition for rehearing on the decision previously entered on January 19, 1982, with the rehearing denial entered March 26, 1982.

2. That Exhibit "A" attached hereto was filed with the trial court and his appeal is taken pursuant to U.S.C. 1257(2).

3. Appellant was sentenced to death and it is that portion which is being appealed.

II.

The Clerk will please prepare and certify a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include:

HUMPHREY & COMPANY
ATTORNEYS AT LAW
INDIANAPOLIS, INDIANA

1. The docket entries.
2. The transcript and bill of exceptions.
3. All briefs and petitions.
4. A copy of the court's decision.
5. A copy of the order denying rehearing.

CHIPMAN, HUMPHREY AND CHIPMAN

By: _____
Jere L. Humphrey
211 West Jefferson Street
Box 158
Plymouth, Indiana 46563
(219) 936-9283

APR 13 1982
OFFICE OF THE CLERK
SUPREME COURT AND
COURT OF APPEALS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States and Request for Certification of Transcript was mailed by ordinary United States mail, with sufficient postage affixed thereto, to Mr. David P. Holmes, Prosecuting Attorney, 519 North Walnut Street, Plymouth, Indiana 46563, and Mr. Linley Pearson, Office of the Attorney General, 219 State House, Indianapolis, Indiana 46204, this 13 day of April, 1982.

Jere L. Humphrey

CHIPMAN, HUMPHREY & CHIPMAN
ATTORNEYS AT LAW
211 WEST JEFFERSON STREET
PLYMOUTH, INDIANA
PHONE 219-936-9283

STATE OF INDIANA)		IN THE LA PORTE CIRCUIT COURT
)	SS:	
COUNTY OF LA PORTE)		1982 CALENDAR TERM
STATE OF INDIANA)		CAUSE NO. 4807C
)		
VS)		
)		
LARRY WILLIAMS)		NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Appellant))		

Comes now Jere L. Humphrey, Counsel for Appellant, Larry Williams, and states:

1. Notice is hereby given that Larry Williams, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Indiana Supreme Court overruling the Appellant's Petition for Rehearing on the decision previously entered on January 19, 1982, with the rehearing denial entered March 26, 1982.

2. That Appellant appeals pursuant to U.S.C.1257 (2).

3. Appellant was sentenced to death and it is that portion which is being appealed.

CHIPMAN, HUMPHREY AND CHIPMAN

By Jere L. Humphrey

FILED
IN OPEN COURT
APR 12 1982
Kimbell D Vail
CLERK OF LA PORTE CIRCUIT COURT

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed by ordinary United States mail, with sufficient postage affixed, to Mr. David R. Holmes, Prosecuting Attorney, 519 North Walnut Street, Plymouth, Indiana, 46563, and Mr. Linley Pearson, Office of the Attorney General, 209 State House, Indianapolis, Indiana, 46204, this 8 day of April, 1982.

Jere L. Humphrey

HUMPHREY & CHIPMAN
ATTORNEYS AT LAW
53 N. CENTER ST.
PLYMOUTH, INDIANA
219-936-9148

L-3

Exhibit "A"

Supreme Court of the United States

No. A-935

Larry Williams,

Appellant,

v.

Indiana

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the execution and enforcement of the sentence of death imposed upon the appellant and scheduled for Tuesday, July 20, 1982, be and the same is hereby, stayed pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the Supreme Court of Indiana is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

/s/ John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 5th day of May, 1982.

M-1 Francis Carlson

35-50-2-3. Murder. — (a) A person who commits murder shall be imprisoned for a fixed term of forty [40] years, with not more than twenty [20] years added for aggravating circumstances or not more than ten [10] years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars [$10,000].

(b) Notwithstanding subsection (a) of this section, a person who commits murder may be sentenced to death under section 9 [35-50-2-9] of this chapter. [IC 35-50-2-3, as added by Acts 1976, P.L. 148, § 8, p. 718; 1977, P.L. 340, § 116, p. 1533.]

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As added by Acts 1977, P.L.340, SEC.122.*

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other

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(1) separate proceeding on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special jury or juries as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed [illegible] calculated, and premeditated manner without any pretense of moral or legal justification.

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(f) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Nov. 8, 1972. Amended by Laws 1974, c. 74-378, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 108, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 2, 1979.

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27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

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No. 81-6779

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY WILLIAMS,

Appellant

v.

STATE OF INDIANA,

Appellee

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

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LARRY WILLIAMS,

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v.

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ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

The Appellee, the State of Indiana, respectfully moves this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana entered by that Court in cause number 1280-S-443 on January 19, 1982.

OPINION BELOW

The Opinion of the Supreme Court of Indiana appears at 430 N.E.(2) 759 and a copy thereof is appended to the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant and Larry Perkins decided to blackmail Jesse Hubbard as he was a homosexual. They went to his apartment, drank beer and smoked some marijuana. Perkins hit Hubbard with a pistol and Appellant stabbed him and took his billfold containing twenty dollars. Hubbard bled to death due to a stab wound of the heart. Appellant had a prior conviction for murder and at a separate hearing the jury recommended the

death penalty which recommendation was accepted by the trial judge and Appellant was sentenced to death.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

I.

THE INDIANA DEATH PENALTY SCHEME IS NOT IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER

Appellant's complaint that the Indiana death penalty statute is unconstitutional because of the discretion granted prosecuting attorneys in seeking the death penalty is not supported by the teachings of this Court. In support of this argument Appellant cites Furman v. Georgia (1972), 408 U.S. 238. Appellant's reliance is misplaced as this Court said in Gregg v. Georgia (1976), 428 U.S. 153 where Mr. Justice White said at page 225:

> "Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder."

This argument was also rejected in the opinion authored by Mr. Justice Stewart in Gregg, supra at page 199 as follows:

"First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Appended at this point in the opinion was the following footnote:

"The petitioner's argument is nothing more than a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury

> nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.
>
> Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, and Rogers v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U.S. Const., Art, II, § 2."

See also Jurek v. Texas (1976), 428 U.S. 262; Proffit v. Florida (1976), 428 U.S. 242 and Spinkellink v. Wainwright (1978) (C.A.5) 578 Fed.2d 582, cert. denied 440 U.S. 976.

II.

THE INDIANA STATUTE IS NOT UNCONSTITUTIONAL IN THAT IT PERMITS PROSECUTORS TO PLEA BARGAIN WITH THE DEATH PENALTY

Appellant argues that the power of the individual prosecuting attorneys to use the threat of charging one with the death penalty in the plea bargaining process is an unconstitutional burden upon his right to a jury trial and upon his right against compelled self-incrimination. In support of this argument Appellant relies upon United States v. Jackson (1968), 390 U.S. 570 where this Court held that the death sentence provided by the Federal Kidnapping Act was unconstitutional since only those insisting upon a jury trial faced the possibility of a death sentence whereas those tried to the court or upon a plea of guilty faced only life imprisonment. The Indiana statute does not contain such an impermissible burden since the death penalty may be imposed after a plea of guilty; trial by the court as well as after a plea of not guilty followed by a jury

trial and verdict of guilty. Indiana Code, Section 35-50-2-9 in part, provides as follows:

> "(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing."

In Brady v. United States, (1970) 397 U.S. 742, this Court ruled that a guilty plea is not "coerced" merely because a defendant escapes the possibility of a death sentence by pleading guilty. In so holding the court said:

> "But we cannot hold that is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.
>
> "A contrary holding would require the State and Federal Gvoernment to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far."

Further in the case of Bordenkircher v. Hayes (1978), 434 U.S. 357 Hayes was charged with uttering a forged instrument and the prosecutor offered to permit him to plead guilty in return for a five year sentence. If Hayes refused the prosecutor would seek an indictment under the habitual offender statute. Hayes refused the plea agreement, was indicted and after trial received a sentence of life imprisonment. In upholding the action of the prosecuting attorney this Court said:

> "It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies.

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.[8] Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446. To hold that the prosecutor's desire to induce a guilty plea is an unjustifiable standard, which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."

This was followed by Corbitt v. New Jersey (1978), 439 U.S. 212 where this Court upheld a New Jersey statute which provided a mandatory sentence of life imprisonment for a defendant convicted of first degree murder by a jury, but that also allowed the possibility of a sentence of less than life imprisonment for a defendant who entered a plea of non vult as follows:

> "The States and the Federal Government are free to abolish guilty pleas and plea bargaining; but absent such action, as the Constitution has been construed in our cases, it is not forbidden to extend a proper degree of leniency in return for guilty pleas."

III.

THE INDIANA STATUTE DOES PROVIDE FOR MEANINGFUL APPELLATE REVIEW OF ALL DEATH PENALTY CASES.

Appellate next argues that the Indiana death penatly statute does not provide for meaningful appellate review of death penalty cases for two reasons. One, the statute fails

to outline a procedure to distinguish the few cases in which the death penalty is imposed from the many in which it is not; and, Two, the statute fails to establish guidelines for review in order to insure even handed application. The Indiana statute is similar to the Florida statute which was approved by this Court in Proffitt, supra as follows:

> "The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.14(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to [guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . .
> If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. State v. Dixon, 283 So.2d 1, 10 (1973)."

* * * * *

> "Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibily to perform its function of death sentence review with a maximum of rationality and consistency."

Appellant ignores the decision of the Supreme Court of Indiana in the case of Judy v. State (1981), ___ Ind. ___, 416 N.E.(2) 95 wherein Judy voluntarily waived his right to appeal his conviction and sentence of death but the Supreme Court of Indiana proceeded to review the actions of the trial court in imposing the death penalty to assure that the death penalty was

not "wantonly" or "freakishly" imposed. The Court said:

> "Further, our scheme provides for a procedure which enables this Court to review the imposition of the death penalty to further safeguard against the influence of improper or prejudicial factors at the trial level, and to further determine that the elements of arbitrariness and capriciousness condemned by Furman v. Georgia, supra, were not present in the sentencing decision. With the above considerations and guidelines in mind, this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures consistency, fairness, and rationality in the evenhanded operation of the death penalty statute."

The Indiana death penalty statute passes constitutional muster and the automatic review by the Supreme Court of Indiana in every case where the death penalty is imposed assures consistency, fairness and rationality in the evenhanded operation of the law.

CONCLUSION

For the foregoing reasons, the Appellee respectfully moves the Court to dismiss this appeal and affirm the judgment of the Supreme Court of Indiana.

Respectfully submitted,

LINLEY E. PEARSON
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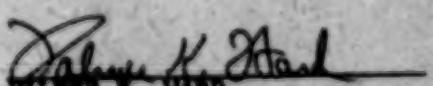
By: 
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